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Supreme Court, U.S.
FILED

No. 10-522

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In The

Supreme Court of the United States

ANTHONY MARK BIANCHI,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 18 U.S.C. §2423(c), a statute that criminalizes conduct by United States citizens in foreign countries on the sole basis that the defendant legally traveled to that country, an unconstitutional exercise of Congressional power under the Foreign Commerce Clause?

2. Did the intentional acts of the prosecutors that prevented an important defense witness from testifying at the trial deny petitioner a fair trial, compulsory process and due process of law?

PARTIES TO THE PROCEEDINGS

Petitioner (Petitioner and Appellant below):

Anthony Mark Bianchi

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Respondent (Respondent and Appellee below):

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CITATIONS FOR OPINIONS BELOW

The Opinion of the Third Circuit Court of Appeals, July 2, 2010 is at 2010 U.S. App. LEXIS 13618. The Memorandum and Order of the United States District Court, January 8, 2009 is reported at 594 F.Supp.2d 532, and that of May 22, 2007 is not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals Denied a Petition for Rehearing *En Banc* on August 4, 2010. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review by writ of certiorari the judgment of the Court of Appeals.

STATUTORY PROVISIONS AT ISSUE

18 U.S.C. §2423(c) provides:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. §2423(f) provides:

> (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the

> sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

STATEMENT OF CASE

Petitioner Anthony Mark Bianchi was convicted in this case on charges related to "sex tourism" – traveling to countries in Eastern Europe for the purpose of engaging in sexual relations with teenage boys. The Second Superseding Indictment included twelve counts: one count charged a conspiracy to engage in illicit sexual conduct in foreign places in violation of 18 U.S.C. §2423(e); four counts charged that petitioner traveled with the intent to engage in illicit sexual conduct in violation of 18 U.S.C. §2423(b); four counts charged that petitioner engaged in illicit sexual conduct in foreign places in violation of 18 U.S.C. §2423(c); and two counts charged that petitioner used a facility in foreign commerce to engage in sexual activity in violation of 18 U.S.C. §2422(b).

Petitioner moved to dismiss the counts in the indictment that invoked Section 2423(c) on the ground that Congress had no authority under the Commerce Clause to enact that criminal statute. The Court denied the motion in a Memorandum and Order on May 22, 2007. App. 68. That issue presents the first question presented in this petition.

The second question presented concerns actions by the government in preventing the appearance of an important defense witness. At the outset of the trial, the government informed the defense that it had issued an arrest warrant for Victor Levintsa, a Moldovan lawyer who was a defense witness and consultant. Mr. Levintsa, who had received legal training at Northwestern University Law School in the United States, had been referred to the petitioner by the U.S. Embassy in Moldova to assist in the investigation and preparation of the defense. He was prepared to impeach a number of the prosecution witnesses.

Following his conviction, petitioner moved for a new trial based on prosecutorial misconduct intended to prevent the testimony of Mr. Levintsa. The trial court held a hearing and, on January 8, 2009, issued a Memorandum and Order denying the motion. App. 37.

The court sentenced petitioner to 300 months' imprisonment to run concurrently on all counts of conviction. On appeal, on July 2, 2010, the Court of Appeals affirmed the judgment. App. 1. A petition for rehearing *en banc* was denied on August 4, 2010. App. 82.

The indictment alleged that petitioner, from late 2003 through the middle of 2005, traveled on separate occasions to Moldova and Romania to engage in illicit sexual conduct with teenage boys. The government's case was based primarily on the testimony of

the complainants who alleged sexual assaults. The government sought to corroborate this testimony with other evidence including material confiscated from petitioner in a search of his person and belongings on March 16, 2005 at the Philadelphia International Airport upon his return from Romania. After the search at the airport, the government obtained a pen register for petitioner's home telephone, and learned of calls to two of the complainants.

During its investigation, the government located other materials, such as receipts for restaurants in Moldova and Romania, documents regarding petitioner's plans to travel to Thailand, and a document showing countries, including Moldova, that do not have extradition treaties with the United States. The government also introduced evidence concerning a search of petitioner's home on January 11, 2006. The defense disputed each of the government's allegations and at trial impeached the complainants. The jury deliberated for three days before returning its verdict.

After the jury's verdict, the parties litigated the government's issuance of an arrest warrant for defense witness, Victor Levintsa. The arrest warrant for Mr. Levintsa was based on allegations of witness intimidation. The government alleged that Mr. Levintsa attempted to persuade the complainants not to travel to the United States. These allegations were never substantiated and Mr. Levintsa was exonerated of any wrongdoing. Defense counsel objected and argued that given the plans to have Mr. Levintsa

travel to Philadelphia for the trial, the government's issuance of an arrest warrant "completely scuttles the defense."

Counsel for the government were aware that their decision to seek the arrest warrant for a member of the defense team would create significant problems. The district court noted that the government "may have made a very major mistake," and stated that issuing an arrest warrant for a member of the defense team on the "eve of trial . . . presents a very major problem." Upon the court's further statements that the government's actions represented a "threat to the possibility of a fair trial" and were a product of "poor judgment," the government informed the court that it would withdraw the arrest warrant.

The defense intended to present the testimony of Mr. Levintsa via live video feed, as he remained wary of traveling to the United States. On July 25, 2007, however, Mr. Levintsa received a telephone call from a Moldovan police officer with the CCTIP who asked him to report for an interview, and informed him that he could be arrested if he refused. After this second threat of arrest for his actions in support of petitioner, Mr. Levintsa submitted a declaration stating that he was not willing to provide any assistance to the defense because of "the intimidation of both the United States Attorney General and the Moldovan Police." Mr. Levintsa stated that he was told that the request for investigation of his activities had come from the United States Embassy in Moldova.

The defense moved for a mistrial. The district court requested the government to investigate whether the interview request came from the United States Embassy. The court also made clear that it believed that the government had intended to prevent Mr. Levintsa from appearing at the trial as it knew that the logical result of informing the defense of the arrest warrant would be to dissuade Mr. Levintsa from traveling to the United States.

On July 27, 2007, the government presented a letter from the United States Ambassador to Moldova confirming that Mr. Levintsa was called for an interview by Moldovan police, but stating that the interview was not requested by the Embassy. The government also presented a letter from a government official stating that Mr. Levintsa "is not a target of criminal investigation," that he was "free to travel outside the Republic of Moldova" and that Mr. Levintsa could "provide video testimony from the Republic of Moldova to the United States."

In light of the actions of the United States government and Moldovan law enforcement officers, Mr. Levintsa declined to travel to the United States or to provide video testimony. The court denied the motion for mistrial, but permitted the introduction of a "Declaration" prepared by Mr. Levintsa presenting the facts to which he would have testified. The declaration was read to the jury and included facts supporting petitioner's defense.

Petitioner filed a timely motion for a judgment of acquittal and/or a new trial on the grounds that the government's intimidation of Mr. Levintsa violated his rights to due process and compulsory process under the Fifth and Sixth Amendments. The district court heard testimony that the government issued an arrest warrant for Mr. Levintsa only after it learned that the Moldovan government would not detain Mr. Levintsa.

The district court concluded that the government had acted intentionally to prevent Mr. Levintsa from traveling to the trial, finding that "the only purpose of issuing the arrest warrant at that time had to be to prevent [Mr. Levintsa] from coming," but denied petitioner's motion on the ground that the introduction of Mr. Levintsa's Declaration remedied any prejudice. App. 37. The Court of Appeals affirmed on this ground. App. 1.

REASONS FOR GRANTING THE PETITION

A. SECTION 2423(c) IS UNCONSTITUTIONAL AS IT EXCEEDS CONGRESSIONAL POWER UNDER THE FOREIGN COMMERCE CLAUSE.

This case presents a constitutional issue not previously addressed by this Court: does Congress have the power under the Foreign Commerce Clause ("FCC") to criminalize conduct by U.S. citizens in foreign countries on the sole basis that the defendant

legally traveled to that location. Because legal travel followed by and otherwise unconnected to a criminal act in another country has no relationship to the regulation of commerce or of channels of travel, Judge Roth was quite correct in her dissent in the court of appeals in concluding that such conduct is beyond the reach of the FCC. Review is necessary to make clear that the FCC is not a "blank check" for government power.

Congress enacted 18 U.S.C. §2423(c) as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub.L.No. 108-21, 117 Stat. 650 (2003). The purpose of the PROTECT Act was to make it a crime for a U.S. citizen to travel to another country and engage in illicit sexual conduct with minors, thereby eliminating the need to prove that the defendant traveled "for the purpose" of engaging in the illegal activity. Yet, Congress made *no* findings that there was a link between illicit sex acts committed abroad and foreign commerce, nor did it provide any evidence that such acts had an effect on commerce.

A majority of the panel ruled that Congress has the power to criminalize conduct of a citizen of the United States in a foreign country where, as will always be the case, the defendant at some point traveled to that country, even where the travel was entirely legal and without intent to commit a crime in that location, where the alleged criminal conduct is non-commercial in nature, and where the conduct

is entirely unrelated to travel. *No* court has recognized such a power under the FCC or under the Interstate Commerce Clause for an analogous crime committed in a state on the basis of the defendant's prior legal interstate travel.

This Court's cases on the Foreign Commerce Clause have addressed the relative powers of the federal and state governments with respect to trade policies with other nations. In this area, Congress has exclusive regulatory powers and may block state taxation of foreign commerce and require states to pay federal customs duties. *See Japan Lines, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979); *Board of Trustees of University of Illinois v. United States*, 289 U.S. 486 (1933). And, while the Court has recognized the government's broad powers under the Foreign Commerce Clause, it has made the same acknowledgment regarding the Interstate Commerce Clause, while still finding significant limits on Congressional power. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).

The panel majority makes the fundamental error of assuming that the Constitution's grant of exclusive and plenary authority over issues of international trade, *vis-a-vis individual U.S. states*, also provides plenary authority to regulate any activity of a U.S. citizen in a foreign nation. But *Japan Lines* makes clear that this authority derives solely from the constitutional allocation of power between the federal government and the states. Accordingly, without a showing of trade or other commercial activity, there is

no power to regulate the conduct of U.S. citizens abroad, as there is no nexus between the power to regulate and the conduct at issue. Just as the Interstate Commerce Clause does not authorize federal regulation of intrastate conduct solely on the defendant's prior legal travel to a particular state, any such construction of the FCC would "obliterate the distinction," *Lopez* at 557, between commercial and non-commercial conduct.[1]

The panel majority rejected the challenge to the statute on the ground that there is a "strong presumption" of constitutionality of Congressional enactments. App. 17. But the panel majority's inability to explain how this provision fits within the powers accorded by the FCC demonstrates the lack of any nexus between foreign commerce and the conduct in this case. As Judge Roth correctly stated, there is no "rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce." App. 21. Further, "[b]ecause Congress severed any jurisdictional tie to the prohibited activity, it is untenable to use the travel element of section 2423(c) to shoehorn a

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[1] The panel recognized that *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), did not address the "non-commercial" provision of the statute. *Clark* sustained a §2423(c) conviction on the grounds that the defendant's payment for sex was "quintessentially economic" activity under the commercial prong of the statute. *But see id.* at 1120 (dissenting opinion).

subsequent unconnected crime into the category of activities that substantially affect foreign commerce." App. 22-23.

The panel also ignored the structure for analyzing Congressional power under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549. In particular, none of the three grounds for asserting power under the Commerce Clause is applicable to this statute. First, the statute does not implicate any interests in regulating the "channels of commerce," to prevent the use of commerce for immoral or injurious purposes (*e.g.*, banning the interstate shipment of stolen goods or kidnapped persons), or by removing obstacles to travel. Thus, to prevent commerce from being used for immoral or injurious purposes, Congress may criminalize travel *with the intent to commit a crime*, as it has done in §2423(b). *See United States v. Bredimus*, 352 F.3d 200 (5th Cir. 2003).

Second, while Congress may regulate the instrumentalities of commerce (including the means of travel, *Lopez*, 514 U.S. at 558), the government has not argued that this interest is implicated here.

Third, with respect to Congressional power to regulate activities that have a substantial impact on foreign commerce, none of the charged conduct in this case involved commercial activity, and there was no evidence provided to Congress that the conduct proscribed, even in the aggregate would have any

measurable effect on foreign commerce. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

The crimes punishable under §2423(c) are no more "commercial" under the Commerce Clause than were the offenses covered by the Gun-Free School Zones Act or the Violence Against Women Act. Congress has no authority under the Foreign Commerce Clause to regulate actions abroad on the ground that a U.S. citizen simply traveled in commerce to reach the nation where the act allegedly occurred. Travel will always be present as it is impossible to commit a crime on foreign soil without traveling at some point in time.

To sustain a federal criminal statute under the Commerce Clause on the ground that the defendant lawfully traveled to another state or foreign country would make virtually every criminal act in every foreign nation and in every state of the union no matter how local in nature, subject to federal jurisdiction. If respondent's theory is valid, there would be *world-wide* jurisdiction to criminalize any act in a foreign nation by a U.S. citizen. The implications of this argument are staggering. Some 63 million American residents traveled outside of the United States in 2008 alone. *See* U.S. Office of Travel and Tourism Industries, http://tinet.ita.doc.gov/outreachpages/inbound.general_information.inbound_overview.html. As of 1999, 3,784,693 Americans were residents of other countries. *See* Federal Citizens Information Center, http://www.pueblo.gsa.gov/cic_text/state/amcit_numbers.html.

The Framers of the Commerce Clause did not intend such an extraordinary reach. *Lopez* emphasized that "commerce . . . is traffic . . . it is intercourse . . . commercial intercourse between nations, and parts of nations," and as relevant here, with a foreign Nation. *Lopez*, 514 U.S. at 553 (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) I, 189-190 (1824)). Because there is nothing illegal about foreign travel, §2423(c) cannot legitimately punish that act as a wrongful use or impediment of commerce. It is not the travel, but the purely independent and unconnected act of engaging in illicit sexual conduct in a foreign country that is proscribed. Such remote and untethered travel cannot serve as a valid jurisdictional "hook." For the same reason that a federal statute criminalizing illicit sexual conduct (or any other act in a particular state) on the ground that at some prior time the defendant legally traveled to that state would be unconstitutional, so too is a statute proscribing such conduct in a foreign nation.

B. THE GOVERNMENT INTENTIONALLY PREVENTED A DEFENSE WITNESS FROM APPEARING AT TRIAL IN VIOLATION OF PETITIONER'S DUE PROCESS AND COMPULSORY PROCESS RIGHTS.

The trial court expressly found "that the decision to notify Levintsa of the arrest warrant was designed to deter him from traveling to the United States to assist with the Defendant's trial." App. 53-54. The court of appeals "assumed" the correctness of this

ruling. App. 12. In so doing, the government violated petitioner's right to due process of law under the Fifth Amendment and his right to compulsory process under the Sixth Amendment.

1. The Constitutional Violations Were *Per Se* Prejudicial.

This Court should grant review to determine whether the trial court's finding that the government acted intentionally to prevent Mr. Levintsa from attending trial requires automatic reversal. In *Webb v. Texas*, 409 U.S. 91 (1972) (*per curiam*), a defense witness was advised by the trial judge that he could be prosecuted for perjury if he lied. *Id.* at 95-96. This admonishment, the Court noted, "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *Id.* at 98. Without any reference to whether the trial court's actions prejudiced the defendant, the Court remanded the case for a new trial.

In *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979), the court explained the reason for a rule of automatic reversal in cases like this one:

> One reason is that this due process violation will almost always be harmful, and it will be very difficult for a court to determine when it is not. This is because a court will seldom be able to determine exactly what evidence would have been brought out had

> the witness been allowed to testify freely. Furthermore, since a constitutional violation is involved, a court would have to be able to conclude that the absence of this unknown testimony was harmless beyond a reasonable doubt. . . . Even if a court could say with the requisite certainty that the omitted testimony would not have changed the outcome of the case, the defendant still should be allowed to attempt to change that outcome by presenting his witnesses.

The lower courts in this case ruled that petitioner would be entitled to a new trial only upon a demonstration of prejudice, relying on *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). There, the defendant moved to dismiss the indictment on the ground that, by deporting two witnesses, the government had prevented him from presenting defense evidence. This Court held that a violation of the defendant's rights to due process and compulsory process "requires some showing that the evidence lost would be both material and favorable to the defense." *Id.* at 873.

This ruling was based on two unique circumstances. First, in acting to deport potential defense witnesses, the government was executing its constitutional authority to enforce immigration laws, *id.* at 863-66, and had acted on a good-faith belief that the witnesses had no favorable defense evidence. *Id.* at 872-73; *see also Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (describing *Valenzuela-Bernal* as having

held that the deportation of witnesses was justified by government's good faith).

Second, the Court concluded that the "closest case in point" was *Roviaro v. United States*, 353 U.S. 53 (1957), where the Court ruled that the government was obligated to disclose the identity of confidential informers only upon a showing of materiality. *Valenzuela-Bernal*, 458 U.S. at 870. Thus, *Valenzuela-Bernal* is an extension of a rule applicable to a defendant's claim of denied access to a *potentially* favorable witness.

The contention that the government's intentional conduct to prevent a defense witness from testifying is *per se* prejudicial is fully consistent with this Court's rulings. *See Youngblood*, 488 U.S. at 57-58 (citing *Valenzuela-Bernal*, 458 U.S. at 872) (concluding that intentional governmental conduct must be shown to demonstrate due process violation in failure to preserve evidence); *California v. Trombetta*, 467 U.S. 479, 488-90 (1984) (finding no constitutional violation in government's failure to preserve breath samples in drunk-driving prosecution without showing of bad faith).

For these reasons, the government's intentional efforts to prevent Mr. Levintsa from appearing at trial require reversal of petitioner's conviction.

2. The Government's Conduct In Preventing Mr. Levintsa From Attending The Trial Seriously Prejudiced Petitioner's Defense

Mr. Levintsa was retained by petitioner at the very early stages of the case and was well versed in all aspects of the investigation. As a result of his travels to Moldova, his review of documents, and his familiarity with the Moldovan legal system, Mr. Levintsa would have been the equivalent of the government's case agent. Further, his testimony would have provided a broad perspective of the investigation from the defense side of the case, and he would have provided impeachment evidence that was essential not only to challenge the complainants' credibility, but also to provide a foundation for the theory that the complainants fabricated allegations for financial reasons.

The lower courts found that the government's actions were harmless chiefly because the defense was permitted to read Mr. Levintsa's written declaration to the jury. In *United States v. Hammond*, 598 F.2d at 1014, the court rejected a similar argument:

> This important testimony would have been more effective had it not been introduced by stipulation. Certainly, live testimony can have more impact than a statement read to the jury. A stipulation is static and deprived of vitality. It is a synthetic substitute for the oracular declarations of a witness. The written word with its depersonalization can

> be no equal to verbalization, and compelling circumstances to the contrary, the defendant must not be deprived of the oral word.

With only the declaration, petitioner was left without the essential "oral word" that is the hallmark of trial by jury. Petitioner lost the opportunity to argue to the jury that a highly trained professional, well-versed in Moldovan law and investigative practice, looked the jurors in their eyes and provided them with a detailed and accurate accounting as to why the government's case could not be believed beyond a reasonable doubt. The government made this exact point in closing argument:

> *You have to look at the kids.* You saw them here. One of the advantages of our court system is what's called the right of confrontation. That is that the person has to come into the courtroom and testify. And you get to look at them. *And you, as the judge will tell you, are using the same tools you use every day when you decide if someone is telling you the truth or not.* Look at those boys. (Emphasis added).

None of the reasons advanced by the court of appeals supports a finding to the contrary. First, the court stated that Mr. Levintsa's testimony would have provided only cumulative impeachment. This statement ignores the important fact that when defense counsel attempted to impeach the complainants with their prior statements, he used English translations of the statements originally provided in Moldovan.

Thus, when witnesses denied having made prior statements that appeared in the translated documents, it was impossible for defense counsel to impeach those witnesses by showing them the translated document. Had Mr. Levintsa been present to testify, he would have been able to provide through his testimony a more succinct and cohesive explanation of the witnesses' prior statements.

Additionally, Mr. Levintsa's impeachment testimony was different in character and quality from mere assertions of inconsistent statements. The most critical aspect of Mr. Levintsa's testimony would have been his description of the complainants' cavalier attitude concerning serious allegations of sexual assault. In particular, the importance of Mr. Levintsa's intended testimony as to complainant MM's demeanor – that he laughed when denying his previous statement that he had been anally raped – cannot be overstated. MM was the government's central witness, a complainant regarding petitioner's first trip to Moldova in December 2003 (Counts 2 and 3) and petitioner's trip to Romania in February and March 2005 (Counts 9 and 10). Even without Mr. Levintsa's testimony concerning MM, the jury had doubts about his credibility as evidenced by the fact that it did not find proof beyond a reasonable doubt of illicit sexual conduct as charged in Count 3. Had Mr. Levintsa testified, there is a reasonable probability that the added weight of impeachment would have given the jury more reason to doubt MM's credibility as to Counts 9 and 10.

The lower courts' assumption that there was no prejudice since the defense was permitted to include relevant information in the declaration fails to take into account the limits of the written word. As this Court has recognized, jurors are more likely to accept as true evidence presented in testimonial form. In ruling that the prosecution must normally be given freedom to present its case in a narrative manner of its own choosing, the Court emphasized the inadequacy of written "testimony":

> Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

Old Chief v. United States, 519 U.S. 179, 188-89 (1997). In this case, jurors were left to wonder what was behind the "closed door" that resulted in Mr. Levintsa's absence from the courtroom, and likely

gave little credence to the information presented in his declaration. Accordingly, prejudice, if necessary, was established.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2664

UNITED STATES OF AMERICA

v.

ANTHONY MARK BIANCHI
a/k/a Mark

Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 06-cr-00019-001)
District Judge: Honorable Bruce W. Kauffman

Argued: May 11, 2010

Before: BARRY, ROTH, *Circuit Judges*
and HAYDEN,* *District Judge*

JUDGMENT

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* Honorable Katharine S. Hayden, United States District Judge for the District of New Jersey, sitting by designation.

This cause came to be heard on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on May 11, 2010.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of sentence be and hereby is affirmed. All in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: July 2, 2010

[SEAL]

Certified as a true copy and issued in lieu of a formal mandate on August 12, 2010

Teste: /s/ Marcia M. Waldron

Clerk, U.S. Court of Appeals for the Third Circuit

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2664

UNITED STATES OF AMERICA

v.

ANTHONY MARK BIANCHI a/k/a Mark

Appellant

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 06-cr-00019-001)
District Judge: Honorable Bruce W. Kauffman

Argued: May 11, 2010.

Before: BARRY, ROTH, *Circuit Judges* and
HAYDEN,* *District Judge*

(Opinion Filed: July 2, 2010)

---

* Honorable Katharine S. Hayden, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION

BARRY, *Circuit Judge*.

Anthony Mark Bianchi appeals from the judgment of sentence, following a jury trial, in this sex

tourism case. He argues that: (1) the government violated his due process and compulsory process rights by intentionally preventing a defense witness from appearing at trial; and (2) 18 U.S.C. § 2423(c) (engaging in illicit sexual conduct in foreign places) was beyond Congress's power under the Foreign Commerce Clause to enact. We will affirm.

I.

This is an extremely disturbing case involving a defendant who repeatedly traveled around the world to meet and engage in sexual conduct with young boys. In the sixteen-month span between December 2003 and March 2005, Bianchi traveled twice to the impoverished village of Trejubeni, Moldova and twice to Romania, each time seeking out boys between the approximate ages of twelve and fifteen. Bianchi was assisted by his unindicted Moldovan co-conspirator, Ion Gusin, who served as a translator and helped Bianchi meet the boys and arrange sexual encounters.[1] Bianchi attempted to ingratiate himself with these boys and their families by buying them gifts, giving them money, and taking them on outings. He engaged in sexual conduct with several boys – including performing oral sex on them and anally raping

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[1] Gusin was convicted in Moldova on charges of child trafficking and recruiting and transporting children for commercial sexual purposes. He is serving a twenty-year prison sentence.

them – and attempted to engage in sexual conduct with several others.

Law enforcement authorities intercepted Bianchi at the Philadelphia airport in March 2005 as he returned from Romania. They searched his luggage and found a children's game, lubricant, a piece of paper containing the name and address of a Romanian boy (A.C.N.), a letter from "Mark" to an unspecified recipient discussing "the meaning of *true* friendship," and a travel notebook of sorts that the government maintained was a log of sexual abuse. Among other evidence, Bianchi's telephone records showed nearly seventy calls to A.C.N. during a five-month period in 2005, and Bianchi had purchased airplane tickets to Thailand for an October 2005 trip for himself, Gusin, and M.M. (a victim he had met in Moldova and traveled with in Romania).

Bianchi was charged in a second superseding indictment with one count of conspiracy to engage in illicit sexual conduct in foreign places, 18 U.S.C. § 2423(e) (Count One); five counts of traveling with the intent to engage in illicit sexual conduct, 18 U.S.C. § 2423(b) (Counts Two, Four, Six, Eight, and Nine); four counts of engaging in illicit sexual conduct in foreign places, 18 U.S.C. § 2423(c) (Counts Three, Five, Seven, and Ten); and two counts of using a facility in foreign commerce to entice a minor to engage in sexual activity, 18 U.S.C. § 2422(b) (Counts Eleven and Twelve). He moved to dismiss the indictment on several grounds, including a challenge to Congress's constitutional authority to enact 18 U.S.C.

§ 2423(c) under the Foreign Commerce Clause. The District Court denied the motion.

Days before trial was set to begin, four of the victim-witnesses reported to U.S. officials in Moldova that they had just been approached at their homes by Serghei Gusin, Ion Gusin's brother, and Victor Levintsa, a Moldovan lawyer assisting Bianchi's defense team, who tried to dissuade them from coming to the United States to testify at Bianchi's trial. After the boys arrived in Philadelphia for the trial, they were interviewed by the prosecutors and Immigration and Customs Enforcement agents. Each boy identified Levintsa and reported him as saying things such as: "Aren't you afraid to go be a witness against Mark [Bianchi] and Gusin?"; "The judge is black and has a face like a monkey, like King Kong and will scare you"; and "America is a very poor country, maybe you won't come back." (Supp. App. at 2-9.) Two days before trial, on July 14, 2007, the government notified the District Court and defense counsel that it was seeking an arrest warrant for Levintsa for witness intimidation, in violation of 18 U.S.C. § 1512(b)(1). Later that day, a magistrate judge issued the warrant.

Bianchi's counsel argued that the arrest warrant "completely scuttles the defense" because Levintsa was to serve as a critical defense witness. (App. at 282.) The parties disputed how important Levintsa was to the defense and whether defense counsel had actually been planning to call him as a witness. Indeed, the government told the District Court that it

was unaware of even the possibility that Levintsa would be a witness until three hours *after* it informed defense counsel of the warrant. In response to the Court's concerns, however, the government withdrew the complaint and arrest warrant, and the Court made clear that it would enforce the government's representation that Levintsa would not be arrested if he traveled to the United States.

Nine of the alleged victims testified at trial and were cross-examined with their prior statements to the police and at Gusin's Moldovan trial, some of which were inconsistent with their testimony at Bianchi's trial. In addition, several adults Bianchi encountered in Romania testified that he expressed interest in meeting families with children.

Levintsa refused to come to the United States and defense counsel arranged for him to testify by video from Moldova. Levintsa then executed a declaration stating that he was "no longer willing to cooperate with the defense of Mr. Bianchi due to the intimidation of both the United States Attorney General and the Moldovan Police" (Supp. App. at 31) because a Moldovan police officer had contacted him for questioning on the day he was to have given his video testimony. The government obtained a letter from the U.S. Ambassador to Moldova, stating that the interview requested by the Moldovan authorities was in no way connected to the U.S. Embassy, and confirming that Levintsa was not under criminal investigation and was free to come to the United States to testify. A letter of assurance from the Moldovan

Ministry of Interior also promised that Levintsa was not the target of a criminal investigation, was free to leave Moldova, and could provide video testimony.

Levintsa continued to refuse to come to the United States or to testify by video. Faulting the government for having set this series of events in motion with its notification that it would seek an arrest warrant, the District Court permitted defense counsel to prepare and read to the jury an eight-page declaration by Levintsa, covering subjects such as tourism in Moldova, the practice of extortion, police interrogation tactics, his experience attending Ion Gusin's trial, and his interviews with several of the alleged victims, including what they told him and his impressions of their demeanor. Few of the government's objections were sustained, with the Court permitting what it called, in a remarkable understatement, "a certain amount of latitude" in light of the circumstances. (App. at 1189.) The Court instructed the jury that Levintsa's absence was not attributable to Bianchi and that it should consider the declaration as if he had so testified in open court.

After a nearly three-week trial, the jury convicted Bianchi on all counts, except for Counts Six and Seven which had earlier been dismissed on the government's motion.[2] Bianchi filed a motion for judgment of

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[2] With respect to Count Three (engaging in illicit sexual conduct in a foreign place, on or about December 2 through 24, 2003) and Count Five (engaging in illicit sexual conduct in a foreign place on or about January 17 through February 8, 2004),

(Continued on following page)

acquittal or a new trial, arguing that the government's notification of its plan to obtain the arrest warrant deprived him of his ability to call Levintsa as a witness and benefit from his assistance during the trial. After several hearings in an effort, as the District Court put it, to "bend[ ] over backwards" for the defense (App. at 1608), the Court denied Bianchi's motion. It found "as a fact that the decision to notify Levintsa of the arrest warrant was designed to deter him from traveling to the United States to assist with [Bianchi's] trial" but that there was no evidence that the government knew that Levintsa would be a witness.[3] (*Id.* at 22-23.) The Court ultimately held that Bianchi was not prejudiced by Levintsa's absence at trial because the jury was read his declaration.

On May 27, 2009, the District Court sentenced Bianchi to concurrent 300 month terms of imprisonment on each of the counts of conviction, lifetime supervised release, restitution of $47,951.20, a fine of $50,000, and a $1,000 special assessment. Bianchi timely appealed.[4]

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the jury found Bianchi guilty with respect to two of the three victims named in each count.

[3] The issue was only whether the notification was proper, not whether the government properly obtained the arrest warrant based on probable cause.

[4] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II.

A.

Bianchi argues that the government intentionally prevented Levintsa from appearing at trial, in violation of his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process.[5] *See Lambert v. Blackwell*, 387 F.3d 210, 260 (3d Cir. 2004) ("Intimidation or threats from the government that dissuade a potential witness from testifying may infringe" on these constitutional rights.). As an initial matter, Bianchi has not pointed to any evidence that the defense team was planning to call Levintsa as a witness during trial; indeed, the first mention of this possibility was apparently *after* the government announced its intention to seek a warrant for Levintsa's arrest, and no witness statement of his had been provided although witness statements had been ordered to be turned over pretrial. Bianchi also argues that Levintsa would have assisted the defense team during trial with his knowledge of Moldova, but has cited no case holding that a defendant's Fifth or Sixth Amendment rights had been violated because he was deprived of this sort of trial

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[5] There is "apparently little, if any, difference in the analysis" between Fifth Amendment due process and Sixth Amendment compulsory process claims. *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445 n.4 (3d Cir. 1992).

assistance.[6] But even assuming that Levintsa was going to testify for the defense, it is eminently clear that Bianchi was not prejudiced by his absence. To the contrary, the declaration admitted in Levintsa's absence was far more favorable to the defense than Levintsa's testimony – which would have been subject to withering cross-examination – ever would have been.

We will assume for purposes of analysis, albeit with no great confidence, that the District Court correctly decided that the government intentionally prevented Levintsa's appearance at trial. Contrary to Bianchi's suggestion, however, this was not a *per se* violation of his constitutional rights. Rather, Bianchi was required to show that Levintsa's testimony would have been material and favorable to his defense. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 873 (1982); *Gov't of Virgin Islands v. Mills,* 956 F.2d 443, 446 (3d Cir. 1992). Evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Mills,* 956 F.2d at 446 (quoting *Valenzuela-Bernal,* 458 U.S. at 874); *see also United States v. Santtini,* 963 F.2d 585, 596-97 (3d Cir. 1992) ("As a general matter, even when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie

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[6] To the extent that Bianchi argues that Levintsa would have provided trial assistance *and* served as a witness, there was a sequestration order in place during trial.

for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith.").

This standard was clearly not satisfied here. Levintsa primarily proffered cumulative impeachment evidence. Importantly, however, that evidence was in fact presented to the jury in the form of his declaration,[7] a declaration as to which defense counsel was given virtually free reign and which contains numerous statements that almost certainly would not have been admissible had Levintsa appeared at trial. The government did not attack the veracity of Levintsa's statements or his credibility, and Levintsa was not subject to cross-examination. Had he been, the government surely would have savaged him and might well have recalled the victims on rebuttal to tell the jury how Levintsa had intimidated them. In short, Levintsa's live testimony would have been devastating – to the defense.

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[7] Other courts have found that substituting other evidence for oral testimony is acceptable when a witness becomes unavailable due to some kind of government conduct. *See Buie v. Sullivan,* 923 F.2d 10, 12 (2d Cir. 1990) (police officer testified at trial regarding an exculpatory statement the non-testifying witness made about the defendant, when the witness was arrested before trial and declined to testify); *United States v. Capozzi,* 883 F.2d 608, 615 (8th Cir. 1989) (excerpts from earlier sworn deposition testimony from non-testifying witnesses presented to jury, when witnesses declined to testify after government named them as unindicted co-conspirators).

In these circumstances, even in the unlikely event that Levintsa would have been a witness at trial, there is no "reasonable likelihood that the testimony could have affected the judgment of the trier of fact" in "a probability sufficient to undermine confidence in the outcome." *Mills,* 956 F.2d at 446 (citations omitted). Accordingly, Bianchi's claims that the government violated his due process and compulsory process rights are without merit.

B.

Bianchi asks us to vacate his convictions on Counts Three, Five, and Ten, which charged him with engaging in illicit sexual conduct in foreign places, or attempting to do so, in violation of 18 U.S.C. § 2423(c). It bears repeating that he does not challenge, on grounds other than the Levintsa issue, his convictions on the other seven counts on which he received, along with the § 2423(c) counts, concurrent sentences of 300 months imprisonment. Nor does he seriously challenge the sufficiency of the evidence with respect to Counts Three, Five, and Ten.[8] Instead,

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[8] Nor could he credibly do so. For example, E.C. (a victim named in Count Three) testified that Bianchi performed oral sex on him and paid him 200 lei in Moldovan money after E.C. stayed with Bianchi overnight. V.S. (a victim named in Count Five) testified that Bianchi left 400 lei at his home after he stayed overnight in the same bed as V.S. and touched him, saying that the money was for letting him sleep in the house. M.M. (the victim named in Count Ten) testified that Bianchi

(Continued on following page)

he argues only that Congress exceeded its authority under the Foreign Commerce Clause when it enacted this statute.[9]

Section 2423(c) provides:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(c).[10] Illicit sexual conduct is defined as:

> (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as

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gave him a birthday gift of $300 during their trip to Romania, during which they engaged in sexual conduct.

[9] The Commerce Clause grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8 cl. 3.

[10] Section 2423(c) was enacted in 2003 as a provision of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003). *See United States v. Clark,* 435 F.3d 1100, 1104 (9th Cir. 2006). Unlike § 2423(b), § 2423(c) criminalizes the illicit sexual conduct itself and does not require that the defendant travel for the purpose of engaging in this conduct.

> defined in section 1591)[11] with a person under 18 years of age.

18 U.S.C. § 2423(f). Thus, the statute criminalizes both non-commercial and commercial illicit sexual conduct committed by U.S. citizens (or permanent residents) in foreign places, and the jury in this case was instructed as to both.[12]

The Ninth Circuit has held that § 2423(c) is constitutional with respect to commercial illicit sexual conduct, *United States v. Clark,* 435 F.3d 1100 (9th Cir. 2006), *cert. denied,* 549 U.S. 1343 (2007), and we find its reasoning persuasive as to that prong of the statute.[13] The *Clark* Court carefully considered the statute and concluded that "§ 2423(c)'s combination of requiring travel in foreign commerce, coupled

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[11] "The term 'commercial sex act' means any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(e)(3).

[12] The District Court, over no objection, instructed the jury:

> The term "illicit sexual conduct" means any one of the three following possibilities: (1) any commercial sex act with a person under eighteen years of age; or (2) knowingly engaging in a sexual act with a person below the age of consent; or (3) knowingly engaging in a sexual act with a person under the age of eighteen years of age by force by rendering the person unconscious or by using a drug or intoxicant to substantially impair the ability of a person to apprise or control the conduct.

(App. at 1342).

[13] Whether § 2423(c) is constitutional with respect to non-commercial sexual conduct was not an issue before the *Clark* Court.

with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree." *Id.* at 1114. It pointed to the fact, and fact it be, that the Supreme Court "has been unwavering in reading Congress's power over foreign commerce broadly" and has never struck down a law as exceeding Congress's Foreign Commerce Clause powers. *Id.* at 1113; *see id.* at 1114 (noting "the predominance of national interests and the absence of state sovereignty concerns in Foreign Commerce Clause jurisprudence," in contrast to Interstate Commerce Clause cases); *see also Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 448 (1979) ("[T]here is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater" than the interstate commerce power.).

The Supreme Court's broad interpretation of the Foreign Commerce Clause applies with equal force to the non-commercial sexual conduct prong of § 2423(c), and Bianchi has simply not made the required "plain showing that Congress has exceeded its constitutional bounds" by enacting that prong of the statute. *United States v. Morrison,* 529 U.S. 598, 607 (2000) (stating that "due respect" for Congress demands that we presume its enactments to be constitutional). Bianchi ignores that "strong presumption," *id.,* of constitutionality and the statute's express requirement of travel in foreign commerce. *See id.* at 611-12 (noting that whether a statute includes an express jurisdictional element is an important consideration in Commerce Clause analysis) (citing *United States v.*

Lopez, 514 U.S. 549, 562 (1995)).[14] Moreover, Bianchi has not even attempted to persuade us that Congress did not have "a rational basis for believing that failure to regulate the non-commercial sexual abuse of minors 'would leave a gaping hole' in the PROTECT Act and its ability to regulate the commercial industry of child prostitution." *United States v. Martinez*, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009) (quoting *Gonzales v. Raich*, 545 U.S. 1, 22 (2005)).

We are satisfied that, given the substantial deference with which we review Congress's determination that a statute is within its constitutional authority and the very generalized nature of the challenge before us, we reach the correct result. We wonder, however, why, in circumstances such as those before us, the government would need or even want to charge § 2423(c) violations when the evidence of § 2423(b) violations – criminalizing interstate or foreign travel for the purpose of engaging in illicit sexual conduct – is so clear. *See United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006) (upholding the constitutionality of § 2423(b) in an interstate commerce case); *United States v. Bredimus*, 352 F.3d 200, 208 (5th Cir. 2003) (upholding the constitutionality, as

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[14] We stress with respect to our dissenting colleague's discussion of the jurisdictional element that we are not suggesting that § 2423(c) is constitutional simply because it requires travel in foreign commerce, but only that such travel is a factor to consider in Commerce Clause analysis. And we are not holding that § 2423(c) is constitutional because the activity here substantially affects foreign commerce.

applied, of § 2423(b) in a foreign commerce case). In any event, we reject Bianchi's Foreign Commerce Clause challenge to § 2423(c), and will affirm his convictions on Counts Three, Five, and Ten.

III.

For the reasons we have set forth, the judgment of sentence will be affirmed.

BIANCHI v. UNITED STATES

No. 09-2644

ROTH, *Circuit Judge*, Concurring in part and Dissenting in part:

I concur with the majority except for its holding in Part II B. Because I believe that criminalizing non-commercial activity abroad exceeds Congress's power under the Foreign Commerce Clause, I cannot join in that holding. I therefore respectfully dissent as to it. Although, as the majority notes, Congress's foreign commerce power is broad, *see Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 448 (1979), it has never been deemed unlimited. Congress may regulate activities that are *commercial* in nature or substantially affect foreign *commerce. See, e.g., United States v. Morrison,* 529 U.S. 598, 611 (2000) (holding that in all cases where federal regulation of local activity has been upheld, it was because "the

activity in question has been some sort of economic endeavor"). However, Title 18 U.S.C. § 2423(c), as defined in section 2423(f)(1), reaches crimes that do not in any sense constitute "Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. I submit that section 2423(c) has a breadth of application that offends our Constitution. For that reason, it should be struck down.

In instructing the jury on the charges brought against Bianchi under section 2423(c), specifically, Counts 3, 5, and 10, the District Court did not distinguish between the commercial and non-commercial aspects of the statute, *i.e.*, § 2423(f)(1) and (f)(2); nor did the court provide the jury with special interrogatories to clarify the grounds for its findings. Instead, the District Court simply instructed the jury that, in order to convict, it need determine only whether Bianchi "engage[d] in illicit sexual conduct outside of the United States." (App. at 1344-45.) For this reason, we cannot tell whether the jury based its guilty verdict as to Counts 3, 5, and 10 on a finding that Bianchi gave money or gifts in exchange for illicit sex, pursuant to section 2423(f)(2), or on a finding that Bianchi engaged in illicit sex with minors while abroad, pursuant to section 2423(f)(1). As a result, in order to uphold Bianchi's convictions on these counts, we must be satisfied that both prongs of the statute are constitutional.

The majority relies on the Ninth Circuit Court of Appeals' opinion in *United States v. Clark,* 435 F.3d 1100 (9th Cir. 2006), to establish that illicit

commercial sex, under section 2423(c), is within Congress's foreign commerce power. The Ninth Circuit affirmed the defendant's conviction under section 2423(c) and (f)(2), finding the statute to be a valid exercise of Congress's Foreign Commerce Clause power. *Id.* at 1116-17. The court did not, however, decide the constitutionality of the non-commercial prong of section 2423(c). *See id.* at 1110 n.16. Indeed, the Ninth Circuit held only that "[t]he *combination* of Clark's travel in foreign commerce and his conduct of an illicit *commercial* sex act in Cambodia shortly thereafter puts the statute squarely within Congress's Foreign Commerce Clause authority." *Id.* at 1116 (emphasis added).

The majority goes on, however, to conclude that Bianchi did not make the required "plain showing that Congress has exceeded its constitutional bounds" by enacting the non-commercial sexual conduct prong of the statute. Majority at 13-14, quoting *Morrison,* 529 U.S. at 607. To the contrary, I find that there is no rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce. *See, e.g., United States v. Lopez,* 514 U.S. 549, 557, 559 (1995) (holding that Congress must have a rational basis for believing that the regulated activity *substantially* affects commerce). Where the perpetrator does not pay, or give other value, for the illicit interactions, the activity being regulated is not economic, and it is therefore beyond the reach of Congress's

power under the Commerce Clause. *Cf. Clark*, 435 F.3d at 1103.

Nor does such activity substantially affect interstate commerce. Although Bianchi purchased a plane ticket to reach the situs of his crimes, section 2423(c) does not contemplate that the travel to get abroad be connected in any way to the subsequent illegal act. When a statute's jurisdictional element "is only tenuously related to the ultimate activity regulated," there can be no assurance that the regulated activity affects interstate commerce. *See United States v. Rodia*, 194 F.3d 465, 472-73 (3d Cir. 1999) (finding a statute's jurisdictional element that required materials, such as film or cameras, to have previously moved in interstate commerce to be "almost useless" in determining whether the ultimate activity regulated – possession of child pornography – substantially affected interstate commerce).

Section 2423(b) of the PROTECT Act criminalizes foreign travel with the intent to engage in the prohibited activity. However, when Congress added section 2423(c), it eliminated the intent element so that "the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country." H.R. Rep. No. 108-66 at 51 (2003). Section 2423(c) contains no intent requirement for the travel, nor does it provide that the "travels in foreign commerce" element coincide, precede, follow, or be within any specified time of the "illicit sexual conduct" element of the offense. Because Congress severed any jurisdictional tie to the

prohibited activity, it is untenable to use the travel element of section 2423(c) to shoehorn a subsequent, unconnected crime into the category of activities that substantially affect foreign commerce.

If, in this case, the jury based its verdict on the sole fact that Bianchi engaged in illicit sex on foreign soil, which the court's instructions permitted it to do, Bianchi would stand convicted of a crime that Congress has no authority to regulate. Vesting Congress with such a general international police power would violate both Bianchi's constitutional rights and the limited nature of our federal government. I would vacate Bianchi's convictions on Counts 3, 5, and 10 and remand this case to the District Court for resentencing.

For the reasons stated above, I respectfully concur in part and dissent in part.

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 06-CR-19-1
ANTHONY MARK BIANCHI	USM Number: 60312-066
	Mark Geragos & Eugene P. Harris, Esquire Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1,2,3,4,5,8,9,10,11,12 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:U.S.C.: 2423(e)	Conspiracy to engage in illicit sexual conduct in foreign places	10/17/2005	1ss
18:U.S.C.: 2423(b)	Traveling with the intent to engage in illicit sexual conduct	12/24/2003	2ss
18:U.S.C.: 2423(c)	Engaging in illicit sexual conduct in foreign places	12/24/2003	3ss
18:U.S.C.: 2423(b)	Traveling with the intent to engage in illicit sexual conduct	2/8/2004	4ss

18:U.S.C.: 2423(c)	Engaging in illicit sexual conduct in foreign places	2/8/2004	5ss

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) 6 and 7 ☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 27, 2009
Date of Imposition of Judgment

/s/ Bruce W. Kauffman
Signature of Judge

Bruce W. Kauffman, U.S. District Court Judge
Name and Title of Judge

6/2/09
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18:U.S.C.: 2423(b)	Traveling with the intent to engage in illicit sexual conduct	1/31/2005	8ss
18:U.S.C.: 2423(b)	Traveling with the intent to engage in illicit sexual conduct	3/16/2005	9ss
18:U.S.C.: 2423(c)	Engaging in illicit sexual conduct in foreign places	3/16/2005	10ss
18:U.S.C.: 2422(b)	Using a facility in foreign commerce to entice a minor to engage in sexual activity	7/23/2005	11ss
		8/9/2005	12ss
18:U.S.C.: 2422(b)	Using a facility in foreign commerce to entice a minor to engage in sexual activity		

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

300 months as to counts 1,2,3,4,5,8,9,10,11 and 12, all terms to run concurrently.

X The court makes the following recommendations to the Bureau of Prisons:

That defendant be placed in a facility that offers a Sex Offender Treatment Program, as close to Wildwood, New Jersey as possible in order to be close to his family.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Lifetime Supervised Release.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer. (Check, if applicable.)

X The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the Probation Officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

Mr. Bianchi is prohibited from access to any Internet service provider, bulletin board system, or any other public or private computer network. Mr. Bianchi shall cooperate with the U.S. Probation Office in the enforcement of this condition by providing any related documentation, allowing inspection of the computer including any devices, programs, and applications, and security taping of any communication jacks, ports, or other taping as deemed necessary. Mr. Bianchi shall follow the directions of the U.S. Probation Office regarding any contact with children of either sex under the age of 18. Mr. Bianchi shall not obtain employment or perform volunteer work which includes, as part of its job description, contact with minor children. The Probation Officer may have the right of reasonable search of the defendant, his residence, or any other establishment within the defendant's custody or control, and may, if necessary, request the assistance of other law enforcement personnel to enforce the provisions of this special condition.

As an additional condition of his supervised release, Mr. Bianchi shall be subject to home confinement with electronic monitoring for a period of 12 months. During this time, Mr. Bianchi shall remain at his place of residence except for employment and other activities approved in advance by the probation officer. Mr. Bianchi shall maintain a telephone at his place of residency without any "call forwarding," "caller ID," "call waiting," modems, answering machines, cordless telephones or other special services for the above period. Mr. Bianchi shall wear an electronic device and shall observe the rules specified by the Probation Department. Mr. Bianchi is to pay the cost of the electronic monitoring portion of his sentence not to exceed the daily contractual rate. Payment for the electronic monitoring shall be made in accordance with the probation officer's direction. Changes to the established rate can be made by the probation office subject to supervisory approval.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 1,000.00**	**$ 50,000.00**	**$ 47,951.20**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk, U.S. District Court, for distribution to the victims to be identified by the Government within 30 days.	47,951.20	47,951.20	
TOTALS	$ 47951.2	$ 47951.2	

☐ Restitution amount ordered pursuant to plea agreement. $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for the X fine X restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ 1,000.00 due immediately, balance due

☐ not later than _____, or
X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

The restitution and fine are due immediately. Mr. Bianchi shall make fine and restitution payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program and provide a minimum payment of $25 per quarter toward the fine and restitution. Any portion of the fine and restitution that is not paid in full at the time of his release from imprisonment shall become a condition of supervision, to be paid at a rate of $1,000.00 per month commencing 30 days after release. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing address or residence that occurs while any portion of the fine and restitution remains unpaid.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of

criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL**
v.	:	**NO. 06-19**
	:	
ANTHONY MARK BIANCHI	:	

MEMORANDUM AND ORDER

Kauffman, J. **January 8, 2009**

Now before the Court is Defendant's Motion for Judgment of Acquittal or New Trial (the "Motion"). For the reasons set forth below, the Motion will be denied.

I. BACKGROUND

This case presents an extraordinarily important issue: When the Government's conduct intentionally precludes the attendance at trial of a member of the defense team, is the defendant entitled to a new trial if he fails to prove actual prejudice resulting from the misconduct?

On February 1, 2007, a grand jury sitting in the Eastern District of Pennsylvania issued a Second Superseding Indictment charging Defendant Anthony Mark Bianchi ("Defendant") with conspiracy to engage in illicit sexual conduct in foreign places in violation of 18 U.S.C. § 2423(e) (Count One); traveling

with the intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b) (Counts Two, Four, Six, Eight, and Nine); engaging in illicit sexual conduct in foreign places in violation of 18 U.S.C. § 2423(c) (Counts Three, Five, Seven, and Ten); and using a facility in foreign commerce to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) (Counts Eleven and Twelve).

By a letter dated Saturday, July 14, 2007, with Defendant's trial scheduled to begin on Monday, July 16, 2007, the Government notified the Court that it was obtaining a warrant to charge Victor Levintsa ("Levintsa"), a Moldovan lawyer who it knew was assisting the defense, with witness intimidation in violation of 18 U.S.C. § 1512. *See* July 14, 2007 Letter, admitted as Court Exhibit 1 at Trial ("Ct. Ex. 1"). The same day, the Government notified defense counsel by telephone of its decision to arrest Levintsa if he came to the United States. The Government then obtained the arrest warrant from Magistrate Judge M. Faith Angell. *See* Arrest Warrant for Victor Levintsa dated July 14, 2007, attached to Gov't Resp. at Exhibit B ("Ex. B").[1]

The Court conducted a hearing regarding the Government's actions on July 16, 2007, prior to the start of trial. At the hearing, the Government withdrew the warrant and informed the Court that Levintsa

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[1] The criminal complaint and arrest warrant against Levintsa were sealed until August 8, 2007.

could testify in the United States without threat of arrest for the conduct that formed the basis of the warrant. On July 17, 2007, Regional Security Officer Cameron Burks obtained assurances from the Moldovan Government that it would not charge or question Levintsa or prohibit him from leaving Moldova in conjunction with the alleged witness intimidation, and that it would postpone a criminal investigation until further notice from the United States. *See* Burks Decl., attached to Gov't Supplemental Reply at Ex. 1. Nevertheless, Levintsa refused to come to the United States to testify. The defense agreed to arrange for him to testify by live video feed from Moldova even though Defendant's counsel asserted that "it was not clear that a live deposition of Levintsa would or could serve as an adequate substitute for his in-court testimony." Def. Mot. 8. However, on the morning of July 25, 2007, the day Levintsa was scheduled to arrange the video feed, and despite the Government's assurances, he received a phone call from a Moldovan police officer, Iurie Slivciuc ("Slivciuc"), who "told [Levintsa] that he had questions to [ask Levinsta] and invited [him] to come to the [Moldovan Center for Combating Trafficking in Persons ("CCTIP")] of the Ministry of the Interior." "Explanation" from Victor Levintsa to Director of the CCTIP dated July 27, 2007, attached to Gov't Resp. at Exhibit E ("Ex. E"). Levintsa informed Slivciuc that under Moldovan law, he was not allowed to provide any information regarding his professional activities with respect to this case. *See id.* Levintsa claims that Slivciuc responded that he could subpoena him, fine

him, or issue a warrant, so he met with Slivciuc that evening. *See id.*

Levintsa subsequently executed a declaration dated July 25, 2007, stating that he no longer was willing to cooperate with the defense due to "the intimidation of both the United States Attorney General and the Moldovan Police." July 25, 2007 Decl. of Victor Levintsa ¶ 15, admitted as Court Exhibit 2 at trial ("Ct. Ex. 2").[2] At the Court's request, the Government investigated whether the United States had a role in the events of July 25, 2007. The Government obtained a letter from the United States Ambassador to Moldova, Michael D. Kirby, which stated that "[i]n no way was [the July 25 interview] sought or requested by the Embassy. Subsequent to learning that this interview took place, we have been in touch with the Government of Moldova, and have confirmed that Mr. Levintsa is not the target of a criminal investigation at this time. We have further confirmed that he is free to depart Moldova at any time and is free to provide testimony in this case." July 26, 2007 Letter from Ambassador Kirby, admitted as Court Exhibit 4 at Trial ("Ct. Ex. 4"). The letter further stated that "[i]n the interests of ensuring a fair trial, the Embassy is at the disposal of the Court to provide any assistance which may be required to

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[2] He also stated that the police officer told him that the request for investigation came from the U.S. Embassy in Moldova, and that further action would be considered by the Office of the Prosecutor General. Ct. Ex. 2 ¶ 14.

permit Mr. Levintsa to participate fully." *Id.* The Government also obtained a letter of assurance from the Deputy Director of the CCTIP which stated that "Mr. Victor Levita [sic] is not a target of criminal investigation. Also . . . Mr. Levinta [sic] is free to travel outside the Republic of Moldova. Furthermore, we would like to inform you that Mr. Victor Levinta [sic] can provide video testimony from the Republic of Moldova to the United States. We would like to assure you that the Center of Combating Trafficking in Persons will assist Mr. Victor Levinta [sic] to conduct this testimony." July 26, 2007 Letter from Deputy Director of the CCTIP, admitted as Court Exhibit 5 at Trial ("Ct. Ex. 5").

Despite the assurances obtained by the Government, Levintsa remained unwilling to travel to the United States or to testify via video feed. The Court then proposed that a declaration from Levintsa be prepared and read to the jury. Levintsa agreed to work with the defense on a declaration containing all of the information that would have been included in his testimony at trial.[3] After the Court ruled on objections from the parties regarding Levintsa's proposed declaration, defense counsel read the revised declaration to the jury with no opportunity for the Government to cross-examine. *See* July 30, 2007

[3] The defense agreed to proceed with the trial using Levintsa's declaration rather than move for a mistrial, but reserved the right to bring a post-trial motion addressing the issues surrounding Levintsa.

Decl. of Victor Levintsa, attached to Gov't Resp. at Exhibit F ("Ex. F"). At the close of trial, the jury returned a verdict of guilty on Counts One through Five and Counts Eight through Twelve of the Second Superseding Indictment.[4] Defendant subsequently filed the instant Motion.

Defendant asserts that the Government's notification of its decision to obtain a warrant for Levintsa's arrest deprived him of his ability to call Levintsa as a witness for the defense and also deprived him of Levintsa's assistance during the course of trial. He alleges violations of his rights to: (1) due process under the Fifth Amendment, (2) an impartial jury trial under the Sixth Amendment, (3) compulsory process for obtaining witnesses in his favor under the Sixth Amendment, and (4) assistance of counsel under the Sixth Amendment. *See* Def. Mot. 1-2. Defendant's Motion and supporting papers do not include any argument with respect to the impartial jury

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[4] The jury found Defendant guilty on Count Three, engaging in illicit sexual conduct in a foreign place, from on or about December 2, 2003 through on or about December 24, 2003, in violation of 18 U.S.C. §§ 2423(c) and (e), but did *not* find him guilty with respect to one of the three alleged victims, MM. Similarly, the jury found Defendant guilty on Count Five, engaging in illicit sexual conduct in a foreign place, from on or about January 17, 2004 through on or about February 8, 2004, in violation of 18 U.S.C. § 2423(c), but did *not* find him guilty with respect to one of the three alleged victims, AS. The Court granted the Government's Motion to Dismiss Counts Six and Seven of the Second Superseding Indictment at the close of evidence.

claim other than an initial blanket assertion that the right was violated.

II. LEGAL STANDARD

A. Legal Standard Under Rule 29

Federal Rule of Criminal Procedure 29 provides, in relevant part, that the trial court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). The Supreme Court has held that the critical inquiry on review of the sufficiency of evidence "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *see also United States v. Taftsiou,* 144 F.3d 287, 290 (3d Cir. 1998) (explaining that review of a Rule 29 motion requires the Court to "interpret the evidence in the light most favorable to the government as the verdict winner" (citing *United States v. Rieger,* 942 F.2d 230, 232 (3d Cir. 1991))).

B. Legal Standard Under Rule 33

Federal Rule of Criminal Procedure 33 provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision to grant a new trial lies within the discretion of the Court. *See, e.g., United States v. Henry,* 2007 WL 2458555, at *2 (E.D. Pa.

Aug. 24, 2007). Rule 33 "may be applied where there is a finding of prosecutorial misconduct, as well as when the trial court does not believe that the evidence supports the jury's verdict." *United States v. Dixon,* 658 F.2d 181, 193 (3d Cir. 1981) (citation omitted); *see also Henry,* 2007 WL 2458555, at *2 ("In exercising its discretion, the court may grant a motion for a new trial on one of two grounds. First, the court may grant the motion if, after weighing the evidence, it determines that there has been a miscarriage of justice. Second, the court must grant a new trial if trial error had a substantial influence on the verdict." (citations and internal quotation marks omitted)). The Court should grant a new trial on the basis of trial errors "only when the errors, when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." *United States v. Faison,* 2006 WL 2473640, at *2 (E.D. Pa. Aug. 23, 2006) (internal quotation marks omitted) (quoting *United States v. Copple,* 24 F.3d 535, 547 n. 17 (3d Cir.1994)).

III. ANALYSIS

The Supreme Court has "recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *United States v. Hasting,* 461 U.S. 499, 508-09 (1983) (finding that the prosecutor's reference to the defendant's

failure to testify – a violation of the Fifth Amendment – was harmless). However, the Supreme Court also has recognized that "certain errors may involve 'rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id.* at 509 n.6 (quoting *Chapman v. California,* 386 U.S. 18, 23 (1967)).[5] "[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *Id.* (noting that in failing to apply the harmless error standard, the Court of Appeals "failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other").

"As a general matter, even when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith." *United States v. Santtini,* 963 F.2d 585, 596-97 (3d Cir. 1992). The Third Circuit has stated that "[w]hen we evaluate whether alleged prosecutorial misconduct has cast an impermissible taint upon a trial, we ask whether the alleged misconduct . . . was

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[5] The Court in *Hasting* specified the right not to be coerced into a confession, the right to counsel, and the right to an impartial judge as examples of errors that can never be harmless. 461 U.S. at 509 n.6.

'sufficiently prejudicial' to violate a defendant's due process rights." *United States v. Bates*, 46 F. App'x. 104, 110 (3d Cir. 2002) (citing *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982)). "In order for prosecutorial misconduct to merit a reversal," the Court "must find that it is more probable than not that the alleged misconduct influenced the jury's ultimate verdict." *Id.* With these general guiding principles in mind, the Court will analyze each of Defendant's arguments using the specific standards set forth under the Fifth and Sixth Amendments.

A. Due Process Under the Fifth Amendment

1. Legal Standard

"Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (finding that the prosecutor's failure to disclose that a juror had applied to work as an investigator in the district attorney's

office did not deprive the defendant of a fair trial). "[T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

The Third Circuit has stated that "[i]ntimidation or threats from the government that dissuade a potential witness from testifying may infringe a defendant's . . . right to due process and Sixth Amendment right to compulsory process." *Lambert v. Blackwell*, 387 F.3d 210, 260 (3d Cir. 2004). "In order to violate the Constitution, the government's conduct must have 'substantially interfered' with a [witness's] choice to testify." *Id.* "Whether substantial interference occurred is a factual determination." *Id.*

Defendant argues that the Third Circuit's decision in *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), holds that when a witness is deterred from testifying by actions of the Government, any conviction must be set aside, irrespective of the Government's good faith or a claimed lack of prejudice to the defendant.[6] In *Morrison*, the Court found that the Government's repeated warnings to the defendant's girlfriend – who allegedly was prepared to testify that it was she and not the defendant who had committed the crime – that she could be arrested if she

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[6] Defendant cites to cases in other circuits with similar holdings. However, as will be discussed *infra*, these cases, like *Morrison*, no longer represent the current state of the law.

incriminated herself on the stand violated the defendant's right to due process and was not a harmless error. *See id.* at 227-28. In reaching its decision, the Third Circuit relied on the Supreme Court's decision in *Webb v. Texas*, 409 U.S. 95 (1972), to adopt a *per se* rule that did not take materiality, prejudice, or bad faith into consideration, stating that "where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless."[7] *Morrison*, 535 F.2d at 228.

In numerous cases after *Morrison*, however, the Supreme Court has concluded that the harmless error standard applies to nearly every case involving alleged constitutional violations. *See, e.g., Hasting*, 461 U.S. at 509 ("[T]he Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."); *Valenzuela-Bernal*, 458 U.S. at 873 (explaining that a violation of the Fifth and Sixth Amendments based on lost witness testimony "requires some showing that the evidence lost would be both material and favorable to the defense"); *Phillips*,

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[7] In *Webb*, the Supreme Court reversed a Texas state court and found that the defendant had been denied due process where the trial judge unnecessarily singled out the defendant's only witness for a lengthy admonition on the dangers of perjury, thus causing the witness to refuse to testify.

455 U.S. at 220 ("[T]he Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial."). Moreover, although the Third Circuit has not explicitly overruled *Morrison*, it has, like most other circuits that originally adopted a *per se* rule, incorporated materiality and bad faith into the standard in light of Supreme Court decisions issued after *Webb*. *See, e.g., Santtini*, 963 F.2d at 596-97 ("[E]ven when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith."); *United States v. Emuegbunam*, 268 F.3d 377, 400 (6th Cir. 2001) ("[G]overnmental conduct must amount to a substantial interference with a witness's free and unhampered determination to testify before we will find a violation of due process or the Sixth Amendment. Even when such interference occurs, a violation of a defendant's right to call witnesses in his defense is subject to harmless error analysis." (citation omitted)); *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997) ("[E]ven if a defendant is able to prove prosecutorial misconduct amounting to substantial interference with a witness, that misconduct will not result in a new trial if it can be said to be harmless."); *United States v. Anderson*, 1994 WL 24961, at *2 (5th Cir. 1994) (noting that the rule of *per se* prejudice when the government interferes with a defense witness has been "modified" and that "[t]o prevail on such a [due process] claim, the defendant now must

show how she was prejudiced by the interference"); *United States v. Saunders,* 943 F.2d 388, 392 (4th Cir. 1991) ("When a defendant is able to establish a substantial government interference, the inquiry moves to the question of whether it was prejudicial or harmless error.").[8]

The Supreme Court's decision in *Valenzuela-Bernal* is particularly instructive. In that case, the Government deported illegal aliens who were witnesses to the crime at issue. The Supreme Court held that the defendant could not establish a violation of due process under the Fifth Amendment based on the Government's action in deporting those witnesses unless "there is some explanation of how their testimony would have been favorable and material to the defense." 458 U.S. at 872-73; *see also id.* at 873 ("Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony would have been material and favorable to his defense, *in ways not merely cumulative to the testimony of available witnesses.*" (emphasis added)). The Supreme Court went on to state that "[a]s in other cases concerning the loss of material evidence, sanctions will

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[8] The Eighth Circuit also has refused to adopt a *per se* rule because (1) its prior decisions make clear that the harmless error doctrine applies in witness intimidation cases and (2) the Supreme Court's decision in *Hasting,* 461 U.S. 499 which came after *Webb,* undermines the notion of a *per se* rule. *See, e.g., Peeler v. Wyrick,* 734 F.2d 378, 381 (8th Cir. 1984).

be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 873-74 (citing *Giglio v. United States,* 405 U.S. 150, 154 (1972)). Thus, the case squarely rejects the notion that the deprivation of a witness is a *per se* violation of a defendant's due process rights.

In *Santtini,* 963 F.2d 585, a previously unindicted co-conspirator of the defendant fled the United States to Columbia, after which he sent a statement to the Government exculpating all his alleged co-conspirators, contending that he acted alone and only had implicated his co-conspirators in prior conversations with the Government in order to gain his own freedom. *Id.* at 588. In an attempt to obtain an admissible Rule 15 deposition of the fugitive, defense counsel persuaded him to agree to a deposition at the U.S. Embassy in Costa Rica if the district court sanctioned an agreement that he not be arrested when he appeared at the deposition. *Id.* at 589. The Government refused to agree not to arrest the fugitive at the end of the deposition, effectively guaranteeing that the witness would not appear. *Id.* Over the Government's objection, the district court ordered the Government not to arrest the fugitive. *Id.* The principles discussed by the Third Circuit in reaching its decision are relevant in that the appellate court had to consider whether the defendant's Fifth and Sixth Amendment rights mandated upholding the lower court's order. The *Santtini* court stated that "[a]s a general matter, even when actions by the

prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith." *Id.* at 596-97.[9]

2. Prosecutorial Misconduct

As the Court stated at the October 2, 2008 hearing, "Did anyone really believe that after being informed that he was going to be arrested if he came to the United States, there was a chance . . . that Mr. Levintsa would come? I mean, that clearly, you had to understand, was a stop order for Mr. Levintsa coming to the United States." Oct. 2, 2008 Hr'g Tr. 163. Later in the same hearing, the Court continued, "If [the Government] really wanted to arrest him,

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[9] Lost evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Gov't of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir.1992) (quoting *Valenzuela-Bernal*, 458 U.S. at 874). Defendant relies heavily on *dicta* in *Mills* citing *Morrison* with approval and characterizing the case as standing for the proposition that "where the government has prevented the defendant's witness from testifying freely before the jury, error cannot be harmless." *Id.* at 448. While this dicta supports Defendant's argument for a *per se* rule, the Court is bound by the Third Circuit's more recent pronouncement in *Santtini* that a showing of prejudice (*i.e.*, that material evidence was unavailable) is required before a defendant is entitled to a remedy.

what [it] would have done is let him come here and then arrest him." *Id.* at 170.[10]

At the October 20, 2008 hearing, the Court concluded that "[b]y giving [Levintsa] advance notice that he was going to be arrested if he came, it proved . . . that [the Government] really didn't want to arrest him. That wasn't their motive." Oct. 20, 2008 Hr'g Tr. 11. Instead, the motive was to prevent Levintsa from coming to the United States to assist with Defendant's defense.[11] Accordingly, the Court finds as a fact that the decision to notify Levintsa of the arrest

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[10] No argument has been made that the Government cannot obtain an arrest warrant when it has probable cause to believe that an individual has violated federal law. Nor has it been argued that once an arrest warrant is obtained, the Government may not arrest that individual. The question before the Court is whether it was proper to notify Defendant's counsel of its intention to obtain an arrest warrant, effectively guaranteeing that Levintsa would not travel to the United States.

[11] The Government was given the opportunity to explain alternative reasons for notifying Defendant's counsel of the arrest warrant, but it elected to assert its privilege as to its deliberative process. *See, e.g., In re United States of Am.*, 398 F.3d 615, 618 (7th Cir. 2005) ("[T]he United States Attorney is not answerable to a judge for the deliberations among his staff. The intra-office conversations and memoranda that the judge wants to see are covered by multiple privileges. . . . [F]ederal judges may not insist that prosecutors reveal deliberative or pre-decisional materials. . . . The Judicial Branch is limited to assessing counsel's public deeds."). Because the Government has elected not to disclose any other motive for notifying Defendant's counsel of the warrant, the Court concludes that the Government did not want to arrest Levintsa, but instead wanted to prevent him from attending the trial in the United States.

warrant was designed to deter him from traveling to the United States to assist with Defendant's trial.

The Government contends that the first time it became aware that Levintsa would be a defense witness was three hours after AUSA Mann notified defense counsel that the Government intended to arrest Levintsa. *See* Gov't Resp. 8-9. Even though there had been several requests for reciprocal discovery from the defense, and the Court had ordered the production of defense witness statements on June 21, 2007, the defense had not identified any witness other than those identified in the Rule 15 depositions. *See id.* at 8.[12] The July 14, 2007 letter to the Court identifies Levintsa merely as "the Moldovan attorney that the defense has referred to in previous filings" and states that he was present at the Rule 15 depositions (although he was introduced at the deposition by defense counsel only as "Victor, our video guy"). *See* Ct. Ex. 1. While the Government concedes that it knew that Levintsa would have provided "some type of support to the defense," Gov't Resp. 9, Defendant points to no evidence that the Government was aware that Levintsa would be a witness at trial.

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[12] In a recent submission to the Court, Defendant claims that Levintsa was "the key defense witness in this case" and would have been "the *sole live witness* to testify on Mr. Bianchi's behalf." Def. Supplemental Mem. 8. He offers no explanation why he failed to identify such an integral component of the defense as a witness despite being ordered by the Court on June 21, 2007 to do so.

3. Prejudice

Even assuming, however, that the Government's decision to notify Levintsa of the arrest warrant started an inexorable chain of events that resulted in his refusal to travel to the United States, and even assuming that the Government was aware that Levintsa intended to be a defense witness, any prejudice resulting from Levintsa's absence was rendered harmless by reading to the jury the declaration containing his testimony. After it became apparent that Levintsa would not testify via video feed, the Court provided the defense team with time to work with Levintsa to draft a declaration containing the testimony he would have presented at trial. The declaration testimony was not subject to cross-examination by the Government, and in fact contained some evidence – for example, hearsay testimony – that otherwise would not have been admissible. Further, the Court made plain to the jury that Defendant was not responsible for the non-appearance of Levintsa.

Defendant argues that he was prejudiced by the absence of Levintsa's live testimony, particularly because Levintsa had interviewed a number of witnesses during the course of his investigation in Moldova and had firsthand knowledge of "relevant conditions" in that country, such as the manner in which criminal cases are investigated and handled, and facts suggesting that witnesses may have been

pressured to testify against Defendant. Def. Mot. 4-5.[13]

Significantly, Levintsa's testimony would not have exonerated Defendant. Rather, his testimony, to the extent it would have been admissible, at best would have served as impeachment evidence with respect to the alleged victims' testimony. This impeachment testimony, such as Levintsa's contention that the boys he interviewed denied that any sexual contact had occurred, was cumulative since the defense cross-examined the boys at trial about other instances in which they admittedly had provided inconsistent statements of what had transpired with Defendant or had otherwise denied that any illicit conduct occurred. As the Supreme Court has explained, the Court's aim in such cases is not to discipline the prosecutor but to ensure that the defendant receives a fair trial. Applying a *per se* rule in cases of weak or cumulative testimony would do little to further that goal.

Defendant argues further that the declaration was incomplete and an inadequate substitute for live

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[13] Defendant's original Motion contains a list of subjects about which Levintsa would have testified, including his interviews with six of the alleged victims. All of these subjects were included in the declaration as read to the jury. Defendant's later filings in support of the Motion contain some additions not included in the declaration. The responsibility for any failure to include relevant information lies solely with the party who drafted the declaration.

testimony. However, the Court allowed Defendant's counsel to include in the declaration all information that Levintsa would have provided in his testimony. The responsibility for any failure to include relevant information lies solely with the party who drafted the declaration.[14] Further, while courts have recognized that a written declaration may not be an adequate substitute for live testimony, *see United States v. Hammond,* 598 F.2d 1008, 1014 (5th Cir. 1979), Defendant's argument that Levintsa would have been more credible had he testified in front of the jury ignores two crucial points. First, the credibility of Levintsa's declaration was never challenged by the Government.[15] Second, and more important, Defendant's argument ignores the efforts undertaken by

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[14] Defendant also argues that the events presented in the declaration "are condensed to provide just the basic facts with little detail that could verify their authenticity or explanations that would have given them greater weight." Def. Second Supplemental Mem. 11. Defendant points to no place in the record, however, where the Court required him to "condense" the declaration.

[15] Indeed, the Government referred to the declaration only once throughout the trial, and in that single reference, it assumed that Levintsa's statement about his meetings with the boys was true. *See* July 31, 2007 N.T. 140 ("Mr. Levintsa – the declaration – he goes through the village the day before they were leaving for the United States with Ion Gusin's brother, another man, and a video camera. And he wants to interview them. And the boys tell them nothing happened. Do you think these boys are going to tell a stranger walking through their village the most shameful thing that ever happened to them? When he's got video camera? What a surprise.").

the Court to render harmless any prejudice by admitting the declaration without cross-examination and by employing a "liberal interpretation" of evidentiary rules. Oct. 20, 2008 Hr'g Tr. 12.[16] Moreover, Defendant clearly was not prejudiced by the absence of live testimony that would have been impermissible hearsay or rejected as irrelevant.[17]

Therefore, even assuming that the Government's decision to notify defense counsel of the arrest warrant improperly deprived Defendant of Levintsa's live testimony, the Court concludes that that conduct was harmless, given the extraordinary steps taken to remedy any prejudice. As the Supreme Court has explained, the overriding question before the Court is not whether the Government acted inappropriately, but whether Defendant received a fair trial. *See Phillips,* 455 U.S. at 219. Based on the overwhelming evidence presented against Defendant at trial and the

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[16] Although Defendant speculates that Levintsa, whom he refers to as "one of the leading lawyers in the country" of Moldova, Def. Second Supplemental Mem. 8, would have excelled under cross-examination and thereby "enhanced his credibility with the jury," *id.* at 9, the fact remains: the Government never challenged the credibility of Levintsa's statements in the declaration.

[17] For example, Defendant contends that Levintsa could have testified "to his experiences with young Moldovan males trying to extort money from wealthy tourists, particularly Americans." Def. Second Supplemental Mem. 13.

limited value of Levintsa's live testimony, the Court concludes that Defendant received a fair trial.[18]

B. Compulsory Process Under the Sixth Amendment

The Supreme Court has "borrowed much of [its] reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from [its] cases involving the Due Process Clause of the Fifth Amendment." *Valenzuela-Bernal,* 458 U.S. at 871. Therefore, as with Defendant's Fifth Amendment claim, the Court must consider whether he has made a showing of materiality. When examining the right to compulsory process guaranteed by the Sixth Amendment, "more than the mere absence of testimony is necessary to establish a violation of the right." *Id.* at 867 (citing *Washington v. Texas,* 388 U.S. 14 (1967)). A defendant "must at least make

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[18] In addition to the trial testimony of the alleged victims, the evidence against Defendant included, *inter alia,* phone records reflecting numerous calls to several of the alleged victims; a notebook listing the names and phone numbers of many of the alleged victims and containing what the Government argued were "coded admissions" of sexual abuse; a wiretapped telephone call in which Defendant admitted that due to "very damaging" statements from one alleged victim, he was having a difficult time preparing a defense; a photograph of a scooter Defendant had shipped to one alleged victim; and statements from Romanian witnesses that they had seen Defendant sleep in the same bed as one of the alleged victims and had purchased a television set for the alleged victim's family.

some plausible showing of how [the] testimony would have been both material and favorable to his defense." *Id.*; *see also Mills*, 956 F.2d at 446.

Relying on Supreme Court precedent, the Third Circuit has stated that for a defendant to establish that he was convicted in violation of his Sixth Amendment right to compulsory process, he must show: (1) that he was deprived of the opportunity to present evidence in his favor; (2) that the excluded testimony would have been material and favorable to his defense; and (3) that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose. *Mills*, 956 F.2d at 446.[19] Evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* (quoting *Valenzuela-Bernal*, 458 U.S. at 874). A "reasonable likelihood" is "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The Government cites *Buie v. Sullivan*, 923 F.2d 10 (2d Cir. 1990), in support of its position that obtaining an arrest warrant against Levintsa did not violate Defendant's Sixth Amendment right to compulsory

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[19] As discussed above, the *Mills* court in *dicta* stated that *Morrison's per se* rule applies in cases of prosecutorial misconduct. In light of the extensive discussion above as to why the *per se* rule no longer applies, the Court will apply the *Mills* test to the facts of this case, despite the *Mills* court's reference to the *Morrison* rule.

process. In *Buie,* an eyewitness told the defense that he would testify that the defendant was not involved in the robbery at issue; however, the day after the trial began, the eyewitness was arrested and charged as an accomplice to the robbery. 923 F.2d at 11. The eyewitness invoked his Fifth Amendment privilege when called to testify at the defendant's trial, and the defense moved for a mistrial, arguing that the police had arrested the eyewitness to prevent him from offering exculpatory testimony about the defendant. *Id.* In habeas proceedings, the defendant argued that the state, in bad faith, arrested the eyewitness to prevent him from testifying. The Court of Appeals concluded that "there is no evidence to conclude that the reason for [the eyewitness's] arrest was anything other than the prosecutor's determination of probable cause for believing that [the eyewitness] participated in the robbery. Speculation such as that offered by [the defendant] does not permit a determination of bad faith on the part of the prosecutor, much less a conclusion that the district court's finding of no bad faith was clearly erroneous." *Id.* at 12-13. The Court of Appeals went on to note that the timing of the arrest was not sufficient to establish either bad faith or a violation of the defendant's Sixth Amendment rights, but that even if the timing had been improper, there still would have been "no basis for reversal because such an error did not 'infect' the fundamental fairness of his trial." *Id.* at 13 (noting that the evidence overwhelmingly supported the defendant's guilt).

As discussed *supra*, Defendant has failed to demonstrate that he suffered more than harmless error at trial. Even assuming that the Government acted in bad faith to prevent a defense witness from testifying, the resulting "error" did not "infect the fundamental fairness of his trial" because the Court allowed Defendant to present all of Levintsa's testimony to the jury through a declaration which was not subject to cross-examination or a rigorous application of the Federal Rules of Evidence. Accordingly, the Court finds no violation of Defendant's right to compulsory process. *See United States v. Capozzi*, 883 F.2d 608, 614-15 (8th Cir. 1989) (finding no Sixth Amendment violation where the trial court allowed the defendant to present as evidence relevant portions of earlier sworn testimony of three defense witnesses who refused to testify after being named as unindicted co-conspirators in the Government's bill of particulars, and where the defendant failed "to delineate any suggested testimony over and above that which was presented to the jury").

C. Assistance of Counsel[20]

The Sixth Amendment guarantees criminal defendants the right to assistance of counsel in their defense. *See, e.g., United States v. Kikumura,* 947 F.2d 72, 78 (3d Cir. 1991) (finding no Sixth Amendment violation where the trial court refused to grant a continuance so that the defendant could appear with his chosen counsel). In interpreting this right, courts have held that due process demands that a defendant "be afforded an opportunity to obtain the assistance of counsel of his choice to prepare and

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[20] The Court notes that Defendant's contention that Levintsa was to act as both witness and counsel at trial is in tension with prevailing public policy. While there is not an absolute prohibition against an attorney testifying at the very proceeding at which he represents his client, the Third Circuit has stated that "[o]rdinarily it is inappropriate for an attorney, or a lawyer in his firm, to testify on behalf of a client." *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 538 (3d Cir. 1976) (referring to Rule DR 5-102 of the Code of Professional Responsibility, which provides that a lawyer shall withdraw as counsel if the "lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client"). Pennsylvania Rule of Professional Conduct 3.7 provides: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." Any exceptions to this so-called advocate-witness rule are to be construed "narrowly" to insure that the proper weight is afforded the policy that "the roles of advocate and witness are fundamentally incompatible." *J.D. Pflaumer, Inc. v. U.S. Dep't of Justice,* 465 F. Supp. 746, 748 (E.D. Pa. 1979).

carry out his defense." *Id.* However, the Third Circuit has "long held that the Sixth Amendment does not guarantee criminal defendants an absolute right to counsel *of their choice*." *Id.* "Due process is satisfied so long as the accused is afforded a fair and reasonable opportunity to obtain his chosen counsel and there is no arbitrary action prohibiting the effective use of such counsel." *Id.*

The Supreme Court has noted that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). "[C]ertain violations of the right to counsel may be disregarded as harmless error." *Id.* at 365. Absent an adverse impact on "the effectiveness of counsel's representation . . . or some other prejudice to the defense. . . . there is no basis for imposing a remedy in [a] proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *Id.* "More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.*

Defendant argues that Levintsa's assistance as counsel at trial was crucial because he speaks Moldovan and Russian as well as English and is familiar with the culture and legal procedures and practices in Moldova. *See* Def. Mot. 4. He contends

that defense counsel relied heavily on Levintsa in preparation for trial, and expected him to continue to provide assistance during the trial by advising on the cross-examination of Moldovan witnesses,[21] translating Moldovan documents, advising on the accuracy of the court translator's translation of Moldovan testimony, and advising counsel on facts local to Moldova as well as cultural factors that might bear on evidence as it developed at trial.[22] *See id.*

Defendant received zealous and effective representation at trial from eminent counsel of his choosing, and he fails to point to any specific evidence impacted by the failure to have Levintsa present as counsel. The translators used at trial were court-appointed, and the defense has offered no evidence that the translation was problematic. Similarly, the defense has pointed to no specific instances in which

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[21] As the Government points out, Defendant has argued himself into a paradox: If Levintsa were in fact the "key defense witness" in this case, he would have been sequestered when other witnesses, such as Officer Durnea, testified. Accordingly, even without the Government's conduct preventing him from attending trial as a witness, Levintsa would have been unable to assist at trial during cross-examination of witnesses. Any role Levintsa would have had in cross-examination, therefore, was precisely the role he was able to play even with the Government's conduct: he would have been able to assist in *preparing* for cross-examination, whether by telephone from Moldova or in person in the United States.

[22] Defendant fails to explain why Levintsa was unable to advise counsel on local facts and cultural factors by telephone from Moldova.

Levintsa's knowledge of Moldovan culture would have been useful, nor has it explained why such knowledge was unattainable by telephone or other forms of communication. Vague, unsubstantiated assertions of prejudice are insufficient to grant the extreme relief Defendant seeks.

IV. CONCLUSION

Because the prosecutorial misconduct did not deprive the Defendant of a fair trial, Defendant's Motion will be denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL**
v.	:	**NO. 06-19**
	:	
ANTHONY MARK BIANCHI	:	

ORDER

AND NOW, this 8th day of January, 2009, upon consideration of Defendant's Motion for Judgment of Acquittal or New Trial (docket no. 201) and all responses and replies thereto, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL**
v.	:	**NO. 06-19**
	:	
ANTHONY MARK BIANCHI	:	

MEMORANDUM AND ORDER

Kauffman, J. **May 22, 2007**

Now before the Court is Defendant's Motion to Dismiss the Second Superseding Indictment (the "Indictment"). For the reasons set forth below, the Motion will be denied.

I. BACKGROUND

On February 1, 2007, a grand jury sitting in the Eastern District of Pennsylvania issued the Indictment charging Defendant, an American citizen, with conspiracy to engage in illicit sexual conduct in foreign places in violation of 18 U.S.C. § 2423(e) (Count One); traveling with the intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b) (Counts Two, Four, Six, Eight, and Nine); engaging in illicit sexual conduct in foreign places in violation of 18 U.S.C. § 2423(c) (Counts Three, Five, Seven, and Ten); and using a facility in foreign commerce to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b) (Counts Eleven and Twelve).

The Indictment alleges that Defendant traveled overseas on five occasions to engage in illicit sex with underage boys. According to the Indictment, Defendant's *modus operandi* was to have his co-conspirator and translator, Ion Gusin, introduce him to the boys. *See* Indictment at 2-6. After becoming acquainted, Defendant would attempt to induce the boys into consensual sex through gifts and money, or he would attempt to rape them.

II. ANALYSIS

Defendant has filed a Motion to Dismiss the Indictment on three constitutional grounds. First, he argues that the charges against him violate his right to substantive due process. Second, he argues that he cannot receive a fair trial in the United States in violation of his right to procedural due process. Third, he argues that 18 U.S.C. § 2423(c) exceeds Congress's power to regulate commerce with foreign nations.

A. Substantive Due Process

The Fifth Amendment's guarantee of "due process of law" includes a substantive component, which forbids the government to infringe certain "fundamental" liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992); *United States v. Salerno,* 481 U.S. 739, 745 (1987).

1. Lack of Nexus

Defendant first asserts that substantive due process requires the Government to demonstrate a sufficient nexus between his conduct and the United States to ensure that extraterritorial application of the charged statutes "would not be arbitrary or fundamentally unfair." He relies on a line of cases decided by the Ninth Circuit. *See, e.g., United States v. Davis,* 905 F.2d 245, 249 (9th Cir. 1990). The Third Circuit, however, has explicitly declined to follow the cases cited by Defendant. *See United States v. Martinez-Hidalgo,* 993 F.2d 1052, 1056 (3d Cir. 1993) ("We decline to follow *Davis* as we see nothing fundamentally unfair in applying . . . [a criminal law] extraterritorially without regard for a nexus between a defendant's conduct and the United States."). The Court has held open the possibility that a nexus may be required to criminalize extraterritorial conduct if that "conduct were generally lawful throughout the world." *Id.* But that is not the situation here. The sexual abuse of children is universally condemned. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 97th plen. mtg., U.N. Doc. A/RES/54/263/Annex II (Mar. 16, 2001), discussed *infra*.

2. Statutes Punish Mere Thinking or Communication

Defendant next argues that § 2423(b) and § 2422(b) violate substantive due process because they criminalize no more than a preparatory act without any requirement that the actual substantive crime be committed. In other words, these statutes do not require "a sufficient nexus between the travel or communication and the [illicit sex] so that the necessary 'intent' . . . may be said with confidence to be the intent to commit the actual proscribed sexual conduct." Defendant's Due Process Brief at 10.

This argument has been rejected by the Third Circuit with respect to § 2423(b). In *United States v. Tykarksy,* 446 F.3d 458 (3d Cir. 2006), the Court explained that § 2423(b) does not prohibit thinking immoral thoughts while traveling. Rather, the travel must be for "the purpose of engaging in any illicit sexual conduct." 18 U.S.C. 2423(b). "By requiring that the . . . travel be 'for the purpose of ' engaging in illicit sexual activity, Congress has narrowed the scope of the law to exclude mere preparation, thought or fantasy; the statute only applies when the travel is a necessary step in the commission of a crime." *Tykarksy,* 446 F.3d at 471.

This reasoning applies equally to § 2422(b). That section prohibits using a means or facility of interstate or foreign commerce to "knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ] any [minor], to engage in [illicit sex], or attempt[ ] to do so." 18 U.S.C.

§ 2422(b). By requiring that the means of foreign commerce be used to "knowingly induce, entice, or coerce" a minor to engage in illicit sex, Congress narrowed the scope of the law to exclude mere preparation or thought.

3. Fundamental Right to Travel

Finally, Bianchi contends that Section § 2423(b) criminalizes mere travel in violation of his fundamental right to travel. It is well-established that "the right to travel is an aspect of liberty that is protected by the Due Process Clause[ ]" of the Fifth Amendment. *Jones v. Helms,* 452 U.S. 412, 418 (1981). No federal court, however, has held that an individual has a right to travel for an illicit purpose. Furthermore, the Third Circuit has stated that "even [assuming] the proposition that § 2423(b) interferes with [the] fundamental right to travel, Congress clearly has a compelling interest in punishing individuals who travel . . . to engage in illicit sexual activities with minors, and § 2423(b) is narrowly tailored to serve that interest." *Tykarksy,* 446 F.3d at 472 (internal citations omitted).

B. Procedural Due Process (Fair Trial)

Defendant argues that a fair trial in the United States is impossible. U.S. Const. amend. V; *Strickland v. Washington,* 466 U.S. 668, 684-685 (1984) ("[t]he Constitution guarantees a fair trial through the Due Process Clauses . . . [and] it defines the basic

elements of a fair trial largely through the several provisions of the Sixth Amendment"). The right to procedural due process is a flexible standard that requires a fact specific inquiry. *See Lassiter v. Dep't of Social Services,* 452 U.S. 18, 24 (U.S. 1981) ("Due process has never been . . . precisely defined. . . . [It] is not a technical conception with a fixed content unrelated to time, place, and circumstances.") (internal citations omitted).

1. Defendant's Ability to React to the Government's Case at Trial

Defendant first asserts that Philadelphia's distance from Moldova will make it impossible for him to react to the Government's case at trial. He asserts that once trial is underway, his lawyers will have no opportunity to collect rebuttal evidence or to find rebuttal witnesses. According to Defendant, the only remedy would be a series of lengthy and disruptive continuances that would allow his lawyers to fly back and forth to Moldova during the trial.

However, the Court has ordered the Government to take extraordinary measures to ensure that Defendant has the opportunity to mount an affirmative defense. Recognizing the unique circumstances of this case, the Court has ordered production of all Jencks Act material, in addition to any other discovery, months in advance of trial. *See* Memorandum and Order, dated 12/01/2006 (docket no. 55). Additionally, the Government has produced the entire Moldavian

police and court file from that country's investigation of Defendant and his alleged co-conspirator Ion Gusin. These files contain victim statements, victim testimony at Gusin's trial, and a large volume of other materials. Together, these documents provide Defendant with a detailed roadmap of the Government's case. Accordingly, Defendant has an adequate opportunity to prepare a rebuttal case in advance of trial.

2. Witnesses

Defendant next contends that he cannot present an affirmative defense because he is unable to compel the attendance of witnesses who reside in Moldova. The Sixth Amendment provides that the accused shall have "compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. This means, "at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987).

Defendant asserts the necessity to compel witnesses from Moldova and that the Court has no authority to do so. *See, e.g., United States v. Theresius Filippi,* 918 F.2d 244, 246 n.2 (1st Cir. 1990) ("The United States has no subpoena power over a foreign national in a foreign country."). The possibility that there may be material defense witnesses in foreign countries who cannot be reached by the subpoena power of the Court, however, does not render the

Indictment unconstitutional. Convictions "are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries." *United States v. Zabaneh*, 837 F.2d 1249, 1259-1260 (5th Cir. 1988); *see also United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962), *cert. denied* 369 U.S. 820 (1962); *United States v. Moussaoui*, 382 F.3d 453, 463 (4th Cir. 2004). "Otherwise any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor." *United States v. Haim*, 218 F. Supp. 922, 926 (S.D.N.Y. 1963).[1]

3. Physical Evidence

Finally, Defendant contends that he cannot receive a procedurally fair trial in the United States because most of the physical evidence against him comes from abroad and, thus, is difficult to access. This, he argues, violates his Sixth Amendment right to offer exculpatory evidence. *See Pennsylvania v. Richie*, 480 U.S. at 56 (holding that the Sixth Amendment's right to compel and offer favorable witnesses includes the "right to put before a jury

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[1] The Government has offered to assist Defendant to secure permission for his witnesses to enter the United States and to help Defendant memorialize through depositions the testimony of witnesses who cannot or will not leave Moldova.

evidence that might influence the determination of guilt").

Defendant admits that it is constitutional and routine for the Government to prosecute cases where most of the physical evidence is located outside the United States. *See, e.g., United States v. Yousef,* 327 F.3d 56, 111-115 (2d Cir. 2003). He distinguishes those prosecutions, however, on the basis that either (1) there was no better place to prosecute, or (2) the harmful conduct overseas threatened specific harm in the United States. Without one of those justifications, Defendant argues, a trial that is far removed from the relevant physical evidence would violate his procedural due process rights.

The fact that Defendant also could be prosecuted in Moldova has no relevance to whether he can receive a procedurally fair trial in the United States. What is important is Defendant's ability adequately to collect evidence for a trial in the United States. This Court has taken extraordinary steps, such as ordering the early production of Jencks Act material, to ensure that Defendant has a sufficient opportunity to collect and present evidence at trial.

Similarly, Defendant's argument that a cross-border crime cannot be tried fairly in the United States unless it threatens "specific harm" has been rejected by the Third Circuit. In *United States v. Martinez-Hidalgo,* 993 F.2d 1052, 1056 (3d Cir. 1993), the Court held that, unless a defendant's conduct is generally lawful throughout the world, no nexus to

the United States is required for Congress permissibly to regulate extraterritorial criminal conduct.

IV. Foreign Commerce Clause

Defendant challenges Congress's constitutional authority to enact 18 U.S.C. § 2423(c).[2] At issue is whether § 2423(c) exceeds Congress's constitutional power to regulate foreign commerce. U.S. Const. art. I., § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). Because of "due respect for the decisions of a coordinate branch of Government," the Court will find a statute unconstitutional "only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607.

As a threshold matter, the Court notes that Congress's authority under the Foreign Commerce Clause is broad. *See Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."). Where the Supreme Court has limited Congress's

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[2] "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

authority to regulate commerce, the fundamental concern has been with protecting the sovereignty of the states against the federal government. *See, e.g., United States v. Lopez,* 514 U.S. 549, 580 (1995) ("The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power.") (O'Connor, J. concurring); *United States v. Clark,* 435 F.3d 1100, 1111 (2006), *cert. denied* 167 L. Ed. 2d 772 (April 16, 2007) ("Regardless of whether the subject matter is drugs, gender-motivated violence, or gun possession, a prominent theme runs throughout the interstate commerce cases: concern for state sovereignty and federalism."). By contrast, "the principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." *Bd. of Trustees of Univ. of Ill. v. United States,* 289 U.S. 48, 57 (1933).[3] When the Supreme Court has considered the Foreign Commerce Clause in other

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[3] The Indian Commerce Clause has also been interpreted to give Congress broad power to legislate. *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to give plenary power to legislate in the field of Indian affairs."). While the Indian Commerce Clause and the Interstate Commerce Clause are parallel phrases, the Supreme Court has justified its different reading of the Indian Commerce Clause by highlighting the lack of federalism concerns. *See id.* at 192 ("[T]he Interstate Commerce Clause . . . is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.").

contexts, it has emphasized Congress's broad and plenary authority. *See Clark*, 435 F.3d at 1113 (citing cases that demonstrate the Supreme Court "has been unwavering in reading Congress's power over foreign commerce broadly").

Having determined that Congress has broad powers to legislate in the arena of foreign commerce, the Court holds that 18 U.S.C. § 2423(c) is a constitutional exercise of that power as applied to Defendant. The statute applies only to American citizens or permanent residents who travel in foreign commerce. Defendant is charged with engaging in illicit sex acts that allegedly occurred on trips where he flew on international commercial flights to Moldova, Romania, or Cuba, and then flew back to the United States. These types of illicit sex acts have been vigorously and uniformly condemned by the international community. *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 97th plen. mtg., U.N. Doc. A/RES/54/263/Annex II (Mar. 16, 2001). The Optional Protocol, which has been ratified by 119 countries, including the United States, Moldova, Romania, and Cuba, requires that the sexual exploitation of children be fully covered by a signatory's national criminal law, "whether such offenses are committed domestically or transnationally." *Id.*

Accordingly, because Defendant has failed to make "a plain showing that Congress has exceeded its constitutional bounds" in enacting 18 U.S.C.

2423(c), his Foreign Commerce Clause challenge will be denied.

V. Conclusion

For the reasons stated above, Defendant's Motion to Dismiss the Indictment will be denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL**
v.	:	**NO. 06-19**
	:	
ANTHONY MARK BIANCHI	:	

ORDER

AND NOW, this 22nd day of May, 2007, upon consideration of Defendant's Motion to Dismiss the Second Superseding Indictment (docket no. 50), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Bruce W. Kauffman

BRUCE W. KAUFFMAN, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2664

UNITED STATES OF AMERICA

v.

ANTHONY MARK BIANCHI
a/k/a Mark

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 06-cr-00019-001)
District Judge: Honorable Bruce W. Kauffman

Present: McKEE, *Chief Judge,* SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE and ROTH,* *Circuit Judges,* and HAYDEN,* *District Judge*

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* Judge Roth's vote is limited to panel rehearing, and she has so voted.

* Judge Hayden's vote is limited to panel rehearing.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: August 4, 2010
PDB/cc: All Counsel of Record

Supreme Court, U.S.
FILED
DEC 21 2010
OFFICE OF THE CLERK

No. 10-522

In the Supreme Court of the United States

ANTHONY MARK BIANCHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2423(c), which prohibits an American citizen or permanent resident alien from traveling in foreign commerce and engaging in illicit sexual conduct, exceeds Congress's power under the Foreign Commerce Clause.

2. Whether the court of appeals correctly denied, on harmless-error grounds, petitioner's claim that the government deprived him of due process and compulsory process by preventing a defense witness from testifying.

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In the Supreme Court of the United States

No. 10-522

ANTHONY MARK BIANCHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is unreported. The opinion of the district court denying petitioner's motion for judgment of acquittal or for a new trial (Pet. App. 37-67) is reported at 594 F. Supp. 2d 532. The opinion of the district court denying petitioner's motion to dismiss the second superseding indictment (Pet. App. 68-81) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2010. A petition for rehearing was denied on August 4, 2010. Pet. App. 82-83. The petition for a writ of certiorari was filed on October 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to engage in illicit sexual conduct in foreign places, in violation of 18 U.S.C. 2423(e); four counts of traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. 2423(b); two counts of using a facility in foreign commerce to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); and three counts of traveling in foreign commerce and engaging in illicit sexual conduct, in violation of 18 U.S.C. 2423(c). Pet. App. 24-26. Petitioner was sentenced to 300 months of imprisonment, to be followed by a lifetime of supervised release. *Id.* at 26, 28. The court of appeals affirmed. *Id.* at 1-23.

1. Between December 2003 and March 2005, petitioner traveled twice to the impoverished village of Trejubeni, Moldova, and twice to Romania. Pet. App. 5; Gov't C.A. Br. 7. On those trips, petitioner molested or attempted to molest several boys between the ages of 12 and 15—engaging in acts including oral sex and anal rape—and began the process of grooming other boys for molestation. Pet. App. 5-6; Gov't C.A. Br. 7-15. Ion Gusin, an unindicted Moldovan co-conspirator who is currently serving a 20-year sentence in Moldova for sex trafficking, served as petitioner's translator, and helped petitioner meet and arrange sexual encounters with the boys. Pet. App. 5 & n.1. In order to ingratiate himself with his victims and their families, petitioner gave them money and gifts, and took them on outings. *Id.* at 5; Gov't C.A. Br. 7-15.

In March 2005, when petitioner was returning from a trip to Romania, customs agents searched his luggage. Pet. App. 6; Gov't C.A. Br. 7. The agents found a chil-

dren's board game, sexual lubricants, a piece of paper with the name and telephone number of a Romanian boy (A.C.N.), a handwritten letter addressed to a child, and a notebook containing (among other things) the names and numbers of many of his victims. Pet. App. 6; Gov't C.A. Br. 16, 18-19. Petitioner's telephone records showed almost 70 calls to A.C.N. in 2005. Pet. App. 6. A January 2006 search of petitioner's home uncovered reservations for petitioner to take Gusin and a Moldovan victim to Thailand; the trip had been canceled in September 2005, shortly after Moldovan police had interviewed Gusin and the victim. *Ibid.*; Gov't C.A. Br. 16-17.

2. a. Petitioner was charged in a second superseding indictment with one count of conspiring to engage in illicit sexual conduct in foreign places, in violation of 18 U.S.C. 2423(e); five counts of traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. 2423(b); two counts of using a facility in foreign commerce to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); and four counts of traveling in foreign commerce and engaging in illicit sexual conduct, in violation of 18 U.S.C. 2423(c). 06-19 Docket entry No. 70 (E.D. Pa. Feb. 1, 2007).

As to those latter four counts, Section 2423(c) provides that:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

For purposes of that section, "illicit sexual conduct" is defined as

> (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or
>
> (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

18 U.S.C. 2423(f). The "sexual act[s]" prohibited by the first provision include, among other things, a knowing sexual act, or attempt to commit a sexual act, with someone between the ages of 12 and 16 and at least four years younger than the defendant. 18 U.S.C. 2243(a); see 18 U.S.C. 2246(2) (defining "sexual act" to include the conduct at issue here). A "commercial sex act" under the second provision is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. 1591(e)(3).

b. Petitioner moved to dismiss the indictment on various grounds, including, as relevant here, that Section 2423(c) exceeds Congress's power under the Foreign Commerce Clause "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3. The district court denied the motion. Pet. App. 81. The court recognized that Congress's authority over foreign commerce is broader even than its authority over interstate commerce. *Id.* at 77-78 (citing, *inter alia*, *Japan Line Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979), and *Board of Trs. of Univ. of Ill.* v. *United States*, 289 U.S. 48, 57 (1933)). The court concluded that petitioner had not shown that Congress had exceeded that authority in enacting Section 2423(c), which "applies only to American citizens or permanent residents who travel in foreign commerce." *Id.* at 79. The court furthermore ob-

served that petitioner was "charged with engaging in illicit sex acts that allegedly occurred on trips where he flew on international commercial flights * * * and then flew back to the United States," a type of conduct that has been "uniformly condemned by the international community" in a multilateral agreement. *Ibid.*

3. a. Shortly before trial, four Moldovan victim-witnesses told United States officials that they had been approached at their homes by Gusin's brother and Victor Levintsa, a Moldovan lawyer providing assistance to petitioner's defense team. Pet. App. 7. The victim-witnesses reported that the two men had tried to discourage them from traveling to the United States to testify, telling them such things as "Aren't you afraid to go be a witness against [petitioner] and Gusin?"; "The judge is black and has a face like a monkey, like King Kong and will scare you"; "America is a very poor country, maybe you won't come back"; and "If you go there, you won't come back to your parents." *Ibid.*; Gov't C. A. Br. 23. Two days before trial, the government notified the district court and defense counsel that it was seeking an arrest warrant for Levintsa for witness intimidation. Pet. App. 7. A magistrate judge issued the warrant later that day. *Ibid.*

Petitioner complained to the district court that the arrest warrant "completely scuttles the defense," because Levintsa was a critical defense witness. Pet. App. 7. The government informed the court that it had been unaware of any intent by petitioner to call Levintsa as a witness until three hours after it told petitioner about the arrest warrant. *Id.* at 7-8. Only a few weeks earlier, the district court had ordered the defense to provide the government with the statements of any defense wit-

nesses; no statements by Levintsa had been provided. *Id.* at 54 & n.12.

Although the government disputed petitioner's claim about Levintsa's importance to the trial defense, it nevertheless agreed, in response to concerns voiced by the district court, to withdraw the warrant and to permit Levintsa to come to the United States to testify without any threat of arrest. Pet. App. 8. The district court assured the defense that it would enforce the government's promise. *Ibid.*

Despite these assurances, Levintsa refused to come to the United States. Pet. App. 8. Petitioner arranged for him to testify by video from Moldova. *Ibid.* On the day of Levintsa's scheduled video testimony, a Moldovan police officer contacted Levintsa for questioning. *Ibid.* Levintsa then refused to testify even by video, stating in a declaration that he was "no longer willing to cooperate with the defense of [petitioner] due to the intimidation of both the United States Attorney General and the Moldovan Police." *Ibid.*

The government presented to the district court a letter from the United States Ambassador to Moldova explaining that the U.S. Embassy had played no role in the interview requested by the Moldovan police. Pet. App. 40. The ambassador's letter went on to explain that the Moldovan government had informed the embassy that Levintsa was not the target of a criminal investigation and that Levintsa was free to depart Moldova at any time and to testify in petitioner's case. *Ibid.* The ambassador additionally offered that "[i]n the interests of ensuring a fair trial, the Embassy is at the disposal of the Court to provide any assistance which may be required to permit Mr. Levintsa to participate fully." *Id.* at 40-41. A separate letter from Moldovan authori-

ties similarly assured the court and the parties that Levintsa was not under criminal investigation. *Id.* at 41.

Levintsa nevertheless continued to refuse to testify either in person or by video. Pet. App. 9. Blaming the government for this, the district court permitted defense counsel to read to the jury an eight-page declaration by Levintsa, which covered such topics as "police interrogation tactics, [Levintsa's] experiences attending Ion Gusin's trial, and [Levintsa's] interviews with several of the alleged victims, including what they told him and his impressions of their demeanor." *Ibid.* The government contended that the declaration was full of hearsay and conjecture, but the district court nevertheless allowed most of it into evidence. *Ibid.* The district court later acknowledged that, "using a very liberal interpretation of the Rules of Evidence, [it had] admitted things that probably would not have been admitted had [Levintsa] been here on the stand and testified." Gov't C.A. Br. 27 n.10 (citation omitted); see Pet. App. 9 (court of appeals characterizing the district court's statement that it had permitted "a certain amount of latitude" in the declaration to be "a remarkable understatement"). The district court instructed the jury that petitioner was not responsible for Levintsa's absence and that the jury should consider Levintsa's declaration as if Levintsa had testified in court. Pet. App. 9.

b. At the close of evidence, the government voluntarily dismissed one of the Section 2423(b) counts and one of the Section 2423(c) counts. Pet. App. 42 & n.4. The jury found petitioner guilty on the remaining counts (including the three remaining Section 2423(c) counts), though on two of the counts, the jury found petitioner guilty as to only two of the three victims alleged in the indictment. *Ibid.*

c. Petitioner filed a post-trial motion for acquittal or for a new trial in which he contended that the government's notification of its decision to obtain an arrest warrant for Levintsa had deprived petitioner of his ability to call Levintsa as a witness. The district court denied that motion. Pet. App. 37-67.

The district court stated that "as a general matter, even when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith." Pet. App. 51-52 (quoting *United States* v. *Santtini*, 963 F.2d 585, 596-597 (3d Cir. 1992)) (alterations omitted). Because the government had declined, on executive-privilege grounds, to reveal in court its reasons for issuing the arrest warrant, the district court "f[ound] as a fact that the decision to notify Levintsa of the arrest warrant was designed to deter him from traveling to the United States to assist with [petitioner's] trial." *Id.* at 53-54 & n.11. Petitioner, however, identified "no evidence that the Government was aware" of the specific fact "that Levintsa would be a witness at trial." *Id.* at 54.

The district court proceeded to conclude that "even assuming that the Government's decision to notify defense counsel of the arrest warrant improperly deprived [petitioner] of Levintsa's live testimony, * * * that conduct was harmless, given the extraordinary steps taken to remedy any prejudice" by permitting Levintsa to testify by declaration. Pet. App. 58. The court reasoned that petitioner "clearly was not prejudiced by the absence of" certain portions of the live testimony "that would have been impermissible hearsay or rejected as

irrelevant"; that to the extent Levintsa might have had admissible testimony impeaching the victim witnesses, it would have been cumulative of the cross-examination of those witnesses; that oral testimony would not have made Levintsa more credible, because the prosecution never contested the credibility of the declaration; and that the court had made "efforts" to render Levintsa's absence harmless by "admitting the declaration without cross-examination and by employing a 'liberal interpretation' of evidentiary rules." *Id.* at 56-58.

d. The district court sentenced petitioner to concurrent 300-month terms of imprisonment on each of the counts on which he was convicted, plus lifetime supervised release. Pet. App. 26, 28.

4. a. The court of appeals affirmed. Pet. App. 1-19. It first rejected petitioner's argument that the government had violated his Fifth Amendment right to due process and Sixth Amendment right to compulsory process by intentionally preventing Levintsa from appearing as a defense witness at trial. *Id.* at 11-14. The court of appeals "assume[d] for purposes of analysis, albeit with no great confidence," that the district court had correctly determined that the government had, in fact, intentionally prevented Levintsa from testifying. *Id.* at 12. The court of appeals agreed with the district court that, even so, petitioner still had to show that Levintsa would have presented "material and favorable" testimony. *Ibid.* (citing, *inter alia*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873 (1982)). And the court of appeals further agreed with the district court that petitioner had not made that showing. *Id.* at 13. The court of appeals concluded that Levintsa "primarily proffered cumulative impeachment evidence"; that the jury in fact heard that evidence in the form of a declara-

tion that included statements that would not have been admitted if Levintsa had testified in person; that the government did not attack the credibility or veracity of the declaration; and that if Levintsa had been subject to cross-examination, "the government surely would have savaged him and might well have recalled the victims on rebuttal to tell the jury how Levintsa had intimidated them." *Ibid.* "In short," the court of appeals continued, "Levintsa's live testimony would have been devastating—to the defense." *Ibid.*

The court of appeals also rejected petitioner's Foreign Commerce Clause challenge to the Section 2423(c) counts. Pet. App. 14-19. The court of appeals observed, as a threshold matter, that petitioner was not challenging the sufficiency of the evidence on those counts, and that there was evidence that petitioner had given money to victims named in each of those counts. *Id.* at 14 & n.8. On the merits of petitioner's constitutional claim, the court of appeals stated that petitioner's challenge was "very generalized"; that Congress enjoys "broad" authority to regulate foreign commerce; that the statue expressly requires travel in foreign commerce; that the Ninth Circuit had upheld the "commercial sex" portion of the statute against a similar Foreign Commerce Clause challenge; and that petitioner had not tried to argue that Congress lacked a rational basis for covering even non-commercial sexual conduct as part of a broader enforcement scheme to quash child prostitution. *Id.* at 16-18 (citing, *inter alia*, *United States* v. *Clark*, 435 F.3d 1100 (9th Cir. 2006), cert. denied, 549 U.S. 1343 (2007)) (internal quotation marks omitted).

b. Judge Roth concurred in part and dissented in part. Pet. App. 19-23. She agreed with the majority that petitioner's claim regarding Levintsa's absence at

trial did not warrant relief. *Id.* at 19. But in her view, Section 2423(c) swept too broadly by criminalizing both commercial and non-commercial sexual activity in a foreign country, and "should be struck down." *Id.* at 20.

ARGUMENT

Petitioner renews (Pet. 7-21) his contentions that 18 U.S.C. 2423(c) exceeds Congress's authority under the Foreign Commerce Clause and that his constitutional rights were infringed when Levintsa did not testify at trial. The court of appeals correctly rejected both claims. Further review is unwarranted.

1. Petitioner first contends (Pet. 7-13) that Congress lacked authority under the Foreign Commerce Clause to enact Section 2423(c). That contention lacks merit, and would not, in any event, provide petitioner with any relief from his 25-year term of imprisonment.

a. To begin with, petitioner does not suggest that the court of appeals' decision conflicts with the decision of any other court of appeals concerning the constitutionality of Section 2423(c). In fact, only one other court has passed on the validity of that provision—the Ninth Circuit in *United States* v. *Clark*, 435 F.3d 1100 (2006), cert. denied, 549 U.S. 1343 (2007)—and the court there upheld the portion of the statute that criminalizes commercial sex in combination with travel in foreign commerce (the only portion that was at issue in that case). *Id.* at 1109-1117.

More broadly, petitioner does not cite any decision of another court of appeals in which a court has invalidated *any* statute on the ground that it exceeded Congress's authority under the Foreign Commerce Clause. To the contrary, courts of appeals have rejected Foreign Commerce Clause challenges to other statutes that, like Sec-

tion 2423(c), impose criminal liability for conduct that either directly or indirectly involves foreign travel. See *United States* v. *Bredimus*, 352 F.3d 200, 204-208 (5th Cir. 2003) (upholding 18 U.S.C. 2423(b), which criminalizes "travel[ing] in foreign commerce[] for the purpose of engaging in any illicit sexual conduct with another person"), cert. denied, 541 U.S. 1044 (2004); *United States* v. *Cummings*, 281 F.3d 1046, 1048-1051 (9th Cir.) (upholding 18 U.S.C. 1204(a), which criminalizes, *inter alia*, "retain[ing] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights"), cert. denied, 537 U.S. 895 (2002). Petitioner also does not contend that the court of appeals' decision conflicts with any decision of this Court—nor could he, in light of the fact that (as the court of appeals recognized) this Court "has never struck down a law as exceeding Congress's Foreign Commerce Clause powers." Pet. App. 17.

b. In any event, the court of appeals correctly rejected petitioner's constitutional challenge to Section 2423(c). To the extent that petitioner is arguing that the statute is unconstitutional as applied to him, that argument ignores his actual offense conduct. Petitioner concedes that Congress may criminalize "travel with the intent to commit a crime." Pet. 11 (emphasis omitted).[1] That is precisely what petitioner did when he "traveled

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[1] As petitioner points out (Pet. 11), travel with the intent to commit sexual crimes against minors would violate 18 U.S.C. 2423(b), which prescribes punishment for "a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person." When the defendant actually does engage in the illicit sexual conduct that is the object of his travel, his conduct violates 18 U.S.C. 2423(c) as well.

around the world to meet and engage in sexual conduct with young boys." Pet. App. 5; see *ibid.* (petitioner "traveled twice to the impoverished village of Trejubeni, Moldova, and twice to Romania, each time seeking out boys between the approximate ages of twelve and fifteen"). Petitioner moreover appears to concede that Congress has the power to regulate commercial sexual activity by U.S. citizens in foreign countries. Pet. 10-11 & n.1. And despite petitioner's assertions to the contrary (Pet. 11), that, too, describes the offense conduct here. See Pet. App. 5 (describing how petitioner "attempted to ingratiate himself with these boys and their families by buying them gifts, giving them money, and taking them on outings"); *id.* at 14 n.8 (describing evidence that petitioner paid money to at least one of the victims in each of the Section 2423(c) counts on which he was convicted).[2]

c. If petitioner means instead to challenge the constitutionality of Section 2423(c) on its face, his argument fares no better. As just described, petitioner concedes that the statute is constitutional in at least some applications. Cf. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (plaintiff raising facial challenge "must establish that no set of circumstances exists under which the [statutory provision] would be valid"). And the argu-

[2] There can be no reasonable dispute that petitioner's three Section 2423(c) convictions all are premised upon travel with an intent to engage in illicit sexual activity, because the jury separately found petitioner guilty of travel with intent to engage in illicit sexual conduct (18 U.S.C. 2423(b)) with respect to each of the trips that formed the basis for those convictions. See 06-19 Docket entry No. 70, at 9-12, 16-17; Pet. App. 42 & n.4. Additionally, as the court of appeals noted, petitioner has not challenged the sufficiency of the evidence that his sexual activity was commercial in nature, nor would such a challenge have any merit. *Id.* at 14 n.8.

ment still would fail even if he had not made those concessions.

Petitioner's contention that Section 2423(c) exceeds Congress's authority under the Foreign Commerce Clause rests on an analogy to the Interstate Commerce Clause. Pet. 9; see U.S. Const. Art. I, § 8, Cl. 3 ("The Congress shall have Power * * * To regulate Commerce * * * among the several States"). This Court, however, has observed that "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979). The Court has explained that, while "Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty," it "has never been suggested that Congress' power to regulate foreign commerce could be so limited." *Id.* at 449 n.13. The Court therefore has applied a more exacting test in determining whether a state tax infringes on federal Foreign Commerce Clause authority than in assessing whether a state tax infringes on federal Interstate Commerce Clause authority. *Id.* at 451. And the Court has repeatedly emphasized the breadth of Congress's power to regulate foreign commerce. See, *e.g.*, *Board of Trs. of Univ. of Ill.* v. *United States*, 289 U.S. 48, 57, 59 (1933) (noting that "[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce," and that "with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power"); *Buttfield* v. *Stranahan*, 192 U.S. 470, 493 (1904) (referring to "the complete power of Congress over foreign commerce"); cf. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193-194

(1824) (explaining that "[n]o sort of trade can be carried on between this country and any other, to which [the Foreign Commerce Clause] power does not extend").

Accordingly, the court of appeals did not err, as petitioner contends, in declining to apply "the structure for analyzing Congressional power" that this Court has employed in cases challenging statutes as exceeding the Interstate Commerce Clause. Pet. 11 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995)). As several courts of appeals have concluded, a statute may be valid under the Foreign Commerce Clause even if an analogous statute enacted pursuant to Congress's authority under the Interstate Commerce Clause would not be. See *Clark*, 435 F.3d 1116; *Bredimus*, 352 F.3d at 207-208; *International Bancorp, LLC* v. *Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 368 (4th Cir. 2003), cert. denied, 540 U.S. 1106 (2004).

d. Petitioner's argument furthermore fails on its own terms. Section 2423(c) includes as an element that the defendant "travel[ed] in foreign commerce." Even under the Interstate Commerce Clause, courts have long upheld the constitutionality of statutes based on movement in interstate commerce that may have occurred long before the primary conduct being regulated—even where that conduct is not itself "commercial" in nature.

In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court construed the predecessor to the current felon-in-possession statute, which required that the defendant's possession of the firearm be "in commerce or affecting commerce." *Id.* at 564. The phrase "affecting commerce," the Court said, indicated that Congress intended to assert "its full Commerce Clause power." *Id.* at 571 (citation omitted). The Court accordingly inter-

preted the statute to prohibit the possession by a felon of any firearm, so long as the firearm had moved in interstate commerce "at some time" before the possession. *Id.* at 564, 575. This Court's subsequent decision in *United States* v. *Lopez*, which invalidated a particular handgun-possession statute as exceeding Congress's authority under the Interstate Commerce Clause, distinguished the invalidated statute from the statute at issue in *Scarborough*, observing that the *Lopez* statute "contain[ed] no jurisdictional element which * * * ensure[d], through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." 514 U.S. at 561.

Since this Court's decision in *Lopez*, the courts of appeals have continued to rely on *Scarborough* in upholding the constitutionality of various statutes (including the felon-in-possession statute). See, *e.g.*, *United States* v. *Ballinger*, 395 F.3d 1218, 1240-1243 (11th Cir.) (en banc), cert. denied, 546 U.S. 829 (2005); *United States* v. *Singletary*, 268 F.3d 196, 200-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); *United States* v. *Santiago*, 238 F.3d 213, 216-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); *United States* v. *Dorris*, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); *United States* v. *Bradford*, 78 F.3d 1216, 1222-1223 (7th Cir.), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1125 (1996). As one of those courts explained, *Scarborough* "established the proposition that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce." *Singletary*, 268 F.3d at 200. Petitioner does not contend, nor could

he, that the prohibition in Section 2423(c) is distinguishable simply because it regulates a person, rather than an item, that has moved in commerce. See, *e.g.*, *North Am. Co.* v. *SEC*, 327 U.S. 686, 705 (1946) (citing "the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature").

e. This case in any event presents a poor vehicle for reviewing the constitutionality of Section 2423(c). First, petitioner has not challenged all possible sources of constitutional authority for Section 2423(c). As the Ninth Circuit has noted, Congress's broad foreign-affairs authority may provide an independent basis, apart from the Foreign Commerce Clause, for its enactment of the statute. See *Clark*, 435 F.3d at 1109 n.14 (citing *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936); *United States* v. *Belmont*, 301 U.S. 324, 331 (1937)). Accordingly, petitioner's convictions might still be constitutionally valid even if petitioner's Foreign Commerce Clause argument were correct.

Second, even assuming that petitioner were able to establish that Section 2423(c) is outside any of Congress's powers, his term of imprisonment would be unaffected. Petitioner was sentenced to 300 months of imprisonment on each of his ten counts of conviction, with all ten sentences to run concurrently. Pet. App. 26. Prevailing on an argument that pertains to only three of the ten counts would therefore not reduce his prison term. For that reason, as well as the reasons previously explained, further review on this issue is unwarranted.

2. Petitioner next contends (Pet. 13-21) that the government intentionally prevented a defense witness

(Levintsa) from testifying at trial, in violation of petitioner's due process and compulsory process rights. That contention also lacks merit. Even assuming (as the court of appeals hesitantly did) that the government intentionally set in motion a chain of events that caused Levintsa's unavailability, the court of appeals correctly concluded that petitioner is not entitled to relief.

a. Petitioner's primary argument is that Levintsa's absence at trial is not subject to harmless-error analysis. But the Court has identified only "a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards." *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (citation and internal quotation marks omitted); see *United States* v. *Marcus*, 130 S. Ct. 2159, 2164-2165 (2010). The error asserted here is not one of them.

In *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), the defendant was arrested for transporting an illegal alien; before trial, the government deported two of the three alien passengers whom the defendant had been driving. *Id.* at 860-861. The defendant claimed that deporting the two passengers violated his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process. *Id.* at 861. This Court held that "[a] violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." *Id.* at 873.

Petitioner attempts to limit the holding in *Valenzuela-Bernal* to the context of witness deportation, "where the government [i]s executing its constitutional authority to enforce immigration laws." Pet. 15. That supposed limitation cannot be squared with the opinion itself. The Court's analysis in *Valenzuela-Bernal* drew in part on the language of the Sixth Amendment, which

"does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor*.'" 458 U.S. at 867 (quoting U.S. Const. Amend. VI). And the Court also cited numerous decisions, not limited to the deportation context, in which it had required a showing of prejudice before concluding that a criminal defendant's constitutional rights have been violated. See *id.* at 867-869; see also *id.* at 872 (treating Fifth Amendment analysis as identical to Sixth Amendment analysis).

Petitioner's reliance (Pet. 14-15) on *Webb* v. *Texas*, 409 U.S. 95 (1972) (per curiam), and *United States* v. *Hammond*, 598 F.2d 1008 (5th Cir. 1979), is misplaced. In *Webb*, the Court reversed a conviction where the trial judge's threatening remarks to a potential defense witness "effectively drove that witness from the stand." *Id.* at 98. The Court did not address what standard of prejudice should apply in that circumstance, and had no occasion to address what standard of prejudice should apply in the circumstance where the witness's absence arises from law-enforcement activity, rather than judicial action. The latter issue, at least, was later resolved, adversely to petitioner's position here, in *Valenzuela-Bernal*.

Hammond was a pre-*Valenzuela-Bernal* case that declined to apply harmless-error analysis to a federal agent's threats against a defense witness during a break in the witness's testimony. 598 F.2d at 1012-1013. Even assuming *Hammond* would apply in the different circumstances of this case (which involve a potential witness who refused to testify, despite government assurances that a fear of prosecution was unfounded), it does not survive *Valenzuela-Bernal*. See, *e.g.*, *United States*

v. *Combs*, 555 F.3d 60, 64 n.3 (1st Cir.) (explaining that subsequent decisions of this Court have superseded appellate precedent, including *Hammond*, that does not require a showing of prejudice in witness-intimidation cases), cert. denied, 129 S. Ct. 2814 (2009).

b. Petitioner alternatively argues that even if a harmless-error standard applies, the court of appeals was mistaken in concluding that any error in his case was harmless. That fact-bound argument does not warrant review. As the court of appeals correctly concluded, petitioner was actually *advantaged* both by having otherwise inadmissible statements from Levintsa admitted into evidence by declaration and by the absence of an opportunity for the government to "savage" Levintsa on cross-examination. Pet. App. 11-14. On the latter point, the court went so far as to state that "Levintsa's live testimony would have been devastating—*to the defense*." *Id.* at 13 (emphasis added).

Petitioner fails to show otherwise. He cites *Hammond*, which concluded, as an alternative to its holding that no showing of prejudice was necessary, that the defendant in that case had shown prejudice from the exclusion of "two defense witnesses" whose testimony was "very important" to his defense. 598 F.2d at 1014. For reasons just explained, that is not the case here. Contrary to petitioner's assertions, neither *Hammond* nor *Old Chief* v. *United States*, 519 U.S. 172 (1997)—which did not address issues of due process or compulsory process—establishes a rule that the omission of live testimony is per se prejudicial in this circumstance. Indeed, such a rule could not be reconciled with the result in *Valenzuela-Bernal*, which upheld a conviction despite the government-caused unavailability of two potential defense witnesses. 458 U.S. at 874.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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